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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~314~~. 56

CARL L. RECKNAGEL, ALBRECHT PAGENSTECHER, AND RUDOLPH PAGENSTECHER, PLAINTIFFS IN ERROR,

VS.

THOMAS MURPHY, LATE COLLECTOR OF THE PORT OF NEW YORK.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED OCTOBER 17, 1877.

SUPREME COURT OF THE UNITED STATES.

No. 314.

CARL L. RECKNAGEL, ALBRECHT PAGENSTECHER, AND RUDOLPH PAGENSTECHER, PLAINTIFFS IN ERROR,

VS.

THOMAS MURPHY, LATE COLLECTOR OF THE PORT OF NEW YORK.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

INDEX.

	Original.	Print.
Writ of error	1	1
Clerk's certificate	2	1
Summons	4	2
Certiorari	6	2
Bill of particulars	8	4
Bill of particulars	10	6
Declaration	12	7
Plea	18	8
Replication	23	10
Judgment	26	11
Bill of exceptions	28	12
Assignment of errors	98	37
Joinder in error	100	37
Bond on writ of error	102	38
Citation	104	39

1 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the judges of the circuit court of the United States for the southern district of New York, greeting:

Because in the records and proceedings, and also in the rendition of the judgment of a plea which is in the said circuit court before you, between Carl L. Recknagel, Albrecht Pagenstecher, and Rudolph Pagenstecher, plaintiffs, and Thomas Murphy, defendant, a manifest error hath happened, to the great damage of the said plaintiffs, as by their complaint appears, we being willing that the error, if any hath been, should be duly corrected, and full and speedy justice done to the party aforesaid in this behalf, do command you, if judgment be therein given, that under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington on the second Monday of October, eighteen hundred and seventy-seven, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done thereon to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the 16th day of May, in the year of our Lord one thousand eight hundred and seventy-seven.

[SEAL.] JOHN I. DAVENPORT, *Clerk.*

The foregoing writ is hereby allowed.

ALEX'R S. JOHNSON,
Cir. Judge.

2 (Indorsed:) U. S. Supreme Court. Carl L. Recknagel et al., plaintiffs in error, against Thomas Murphy, defendant in error. E. & A. D. No. 3, p. 28. Writ of error. Stanley, Brown & Clarke, att'ys for pl'ffs, 195 B'way.

Service of a copy of the within is hereby admitted. N. Y., May 16, 1877.

STEWART L. WOODFORD,
Deft. Att'y.

Filed May 16, 1877.

JOHN I. DAVENPORT,
Clerk U. S. Circuit Court.

UNITED STATES OF AMERICA,
Southern District of New York:

I, John I. Davenport, clerk of the circuit court of the United States of America for the southern district of New York, in the second circuit, by virtue of the foregoing writ of error, and in obedience thereto,
3 do hereby certify that the following pages, numbered from four to 105 inclusive, contains a true and complete transcript of the record and proceedings had in said court in the case of Carl L. Recknagel, Albrecht Pagenstecher, and Rudolph Pagenstecher, plaintiffs in error, against Thomas Murphy, defendant in error, as the same remain of record and on file in said office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed at the city of New York, in the southern district of New York, in the second circuit, this third day of October, in the year of our Lord one thousand eight hundred and seventy-seven, and of the Independence of the said United States the one hundred and second.

[SEAL.] JOHN I. DAVENPORT, *Clerk.*

4 Superior court of the city of New York.

CARL L. RECKNAGEL, ALBRUCHT PAGENSTECHER, & Rudolph Pagenstecher, plaintiffs, *against* THOMAS MURPHY, DEFENDANT. } Summons for relief. (Com. not ser.)

To the defendant:

You are hereby summoned and required to answer the complaint in this action which will be filed in the office of the clerk of the superior court of the city of New York, at the court-house in said city, and to serve a copy of your answer to the said complaint on the subscribers, at their office, No. 16 Wall street, New York City, within twenty days after the service of this summons on you, exclusive of the day of such service; and if you fail to answer the said complaint within the time aforesaid, the plaintiffs in this action will apply to the court for the relief demanded in the complaint.

Dated N. Y., Dec. 28, 1872.

STANLEY, BROWN & CLARKE,
Plaintiffs' Attorney, 16 *Wall st.*

5 (Indorsed:) 2172. N. Y. superior ct. Carl L. Recknagel et al. vs. Thomas Murphy. Summons. Stanley, Brown & Clarke, att'ys for pl'ffs, 16 Wall st. Received Jan. 6, 1873, U. S. attorney's office. To Thomas Murphy, esq., collector, &c. Rec'd Dec. 28, '72.

6 The President of the United States of America to the judges of the superior court of the city of New York, greeting:

We for certain reasons being desirous that our circuit court of the United States for the southern district of New York, in the second circuit, shall be certified of a certain cause commenced before you, against Thomas Murphy, defendant, by Carl L. Recknagel & al., plaintiffs, do therefore command you that the record and proceedings in the said cause you distinctly and openly send to the said circuit court at the city of New York, on the 19th day of May, 1873, as fully and amply as the same are remaining before you, by whatever names the said parties may be called therein, together with this writ, that our said court may cause to be further done thereupon what of right ought to be done.

Witness, Nathan Clifford, esquire, associate justice of the Supreme Court of the United States, the 15th day of May, in the year one thousand eight hundred and seventy-three.

[L. S.] KENNETH G. WHITE, *Clerk.*

GEO. BLISS,
Defendant's Attorney.

7 (Endorsed:) 2172. U. S. circuit court. Thomas Murphy ads. C. L. Recknagel & al. Copy. Certiorari. Geo. Bliss, defendant's attorney.

SIR: Take notice that the within is a copy of a certiorari this day issued out of the circuit court of the United States for the southern district of New York.

New York, May 15, 1873.

Yours, &c.,

GEO. BLISS,
Defendant's Attorney.

Service of a copy of the within and of the above notice is hereby admitted.

New York, May 15, 1873.

STANLEY, BROWN & CLARKE,
Plaintiffs' Attorneys, 16 *Wall st.*

SCHEDULE.

Importers: Recknagel & Co.

Description of merchandise.	Place from whence imported.	Name of vessel.	Date of invoice.	Date of entry at custom-house.	Amount of duty paid in excess.	Date of payment of duty.	Date of filing protest.	Date of appeal to the Secretary of the Treasury.	Date of answer of the Secretary of the Treasury.
Argols. No. of casks.									
10 casks of Argols	Liverpool	Italy	Jan. 25, 1871	Feb. 18 & 25	257 58	Feb. 18, '71	Mar. 24, '71	April 14, '71	Oct. 1st, 1872.
23 “ “	Liverpool	Pennsylvania	“ 18, “	“ 13	588 72	Feb. 25, Mar. 31	“ 25, “	“ “ “	“ “ “
10 “ “	Trieste	Trojan	“ 24, “	“ 21	286 11	July 7 & 11th	“ “ “	“ “ “	Not received.
12 “ “	Marseilles	Ismalia	Dec. 13, '70	“ 20	257 67	Mar. 15 & 24	“ 27, “	“ “ “	“
17 “ “	Liverpool	Denmark	Feb. 15, '71	Mar. 3	443 78	“ 16 & 24	“ “ “	“ “ “	“
6 “ “	London	Helvetia	“ 6, “	Feb. 27	150 84	Apr. 12, Feb. 27, '71.	April 11, “	“ “ “	“
29 “ “	London	Helvetia	Dec. 14, '70	M'ch 17	756 27	Mar, 17	Mar. 24, “	“ “ “	“
25 “ “	Marseilles	Dorian	Dec. 13, “	Mar. 28	632 53	Apr. 3, 4, 25	April 28, “	May 26, “	“
13 “ “	Marseilles	Dacian	Dec. 15, “	Jan. 17	454 50	May 2d	“ “ “	“ “ “	“
6 “ “	Naples	Teresina	Feb. 16, '71	Mar. 22	179 07	Mar. 22d	May 9, “	“ “ “	“
8 “ “	England	Deutschland	“ 25, “	“ 15	138	Mar. 15th	“ “ “	“ “ “	“
15 “ “	Marseilles	Dacian	Mar. 10, “	Apr. 15	417 54	April 15th	“ 15, “	“ “ “	“
25 “ “	Naples	Fenella	Jan. 31, “	Feb. 26.	736 80	Sep. 23, Oct. 4 Mde. 14, Apr. 24	“ 15, “	“ 26, “	“
14 “ “	Liverpool	England	April 12, “	April 14.	328 40	June 14	“ 26, “	“ 26, “	“
10 “ “	England	Deutschland	April 10, “	April 25.	315 66	April 25.	“ “ “	“ “ “	“
15 “ “	Liverpool	Virginia		June 5	414 39	June 8, 27, July 25	July 6, “	July 20, “	“
11 “ “	London	Erin	April 27	May 16.	228 36	May 16.	“ 7, “	“ “ “	“
7 “ “	Liverpool	Holland	April 13 or 15	“ 4	166 08	May 4.	“ 13, “	“ “ “	“
28 “ “	Liverpool	Holland	June 7	June 21	698 52	July 7, '71; July 27, Aug. 11, Sep. 30.	“ 20, “	“ “ “	“
13 “ “	England	Pennsylvania	May 3, '71	May 23	441 76	May 23.	“ 28, “	Aug't 9, “	“
16 “ “	Bremen	Bremen	June 2, '71	June 16	294 15	Mar. 16	“ 29, “	“ “ “	“
8 “ “	Liverpool	France	May 31, '71	“ 13	221 91	Jan. 20, '72	“ “ “	“ “ “	“
21 “ “	Liverpool	Italy	June 22, '71	July 5	531 18	July 13, 21, 28, '71	“ “ “	“ “ “	“
18 “ “	England	Assyria	May 19, '71	June 28	371 70	July 20, '71	Aug. 9, “	“ “ “	“
5 “ “	Marseilles	Dorian	May 26, '71	“ 23		June 23, '71	“ “ “	“ “ “	
11 “ “	Glasgow	Iowa	April 18, '71	June 3	175 77	June 3d, '71	“ “ “	“ “ “	“
20 “ “	Liverpool	Virginia	May 17, '71	“ 6	406 32	June 6, '71	“ 14, “	“ 18, “	“
7 “ “	Liverpool	Scotia	May 20, '71	July 6	128 13	July 6.	“ “ “	“ “ “	“
19 “ “	London	Paraguay	May 18, '71	June 30	337 29	July 15, '71	“ 18, “	“ “ “	“
13 “ “	London	The Queen	June 12, '71	“ “	231 69	June 30, '71	“ “ “	“ “ “	

9	"		"	Palermo	Trojan	June 15, '71	July 15	176 13	July 15, '71	" " "	" " "	"
15	"		"	Liverpool	England	July 3	" 22	383 85	July 22	" 24, "	" 24, "	Oct. 1st, 1872, May 9.
7	"		"	Liverpool	England	"	" 21	165 36	Sep. 4	" 29, "	" 29, "	" "
14	"		"	Liverpool	Virginia	" 12	" 29	331 59	Sept. 8 & Oct. 17	Sep. 1, "	Sept. 1, "	" "
	18	"	"	London	Paraguay	May 18	June 30	337 23	June 30	" " "	" " "	" "
9	8	"	"	Liverpool	France	July 17	Aug. 2, 1871	222 46	Aug. 2	Sep. 8, ..	Sep. 11, '71	May 9, '72, & Oct. 1, '72
	16	"	"	London	Helvetia	" 10	" 1	291 84	" 1	" 8, ..	" " ..	
8	"		"	Liverpool	The Queen	" 24	" 14	181 59	" 14	" 11, .	" " ..	
7	"		"	"	Virginia	" 12	" 1	169 59	" 1	" " ..	" " ..	
8	"		"	"	Batavia	June 10	" "	129 87	" 1	" 18, ..	" 19, ..	
32	"		"	"	Italy	Aug. 1	" 18	633 78	" 18	" 20, ..	" 20, ..	
6	"		"	"	Denmark	June 27	July 13	134 32	July 20, Aug. 11.	" 20, ..	" 20, ..	
34	"		"	Palermo	Luigi	May 8	Aug. 16	669 72	Aug. 16	" 20, ..	" ..	
9	"		"	Glasgow	Iowa	Aug. 4	" 28	328 80	Oct. 28	Oct. 4, ..	Oct. 7, ..	
14	"		"	Liverpool	France	" 30	Sep. 13	346 59	Sep. 23, Oct. 28	" 19, ..	Oct. 19, ..	
29	"		"	"	Spain	" 14	Aug. 28	635 40	Sep. 13, 28; Oct. 27, Nov. 2, Dec. 12.	" 25, ..	Nov. 2, ..	
21	"		"	"	The Queen	Sep. 5	Sep. 23	573 51	Oct. 7, Nov. 1	Nov. 8, ..	" 8, ..	
4	"		"	"	Spain	" 14	Oct. 3	107 59	Nov. 29	" " ..	" " ..	
7	"		"	"	England	Aug. 28	Sep. 8	160 98	Sep. 9	" 9, ..	" 11, ..	
16	"		"	London	Erin	" 16	" 9	279 66	" 9	" 18, ..	" 20, ..	
16	"		"	"	Paruma	Sep. 15	Oct. 10	298 98	Oct. 10	" 29, ..	Dec. 7, ..	
25	"		"	Liverpool	Italy	Oct. 19	Nov. 6	584 52	Nov. 9, Dec. 27, Jan. 15, Feb. 19	Dec. 13, ..	" 13, ..	Not received.
12	"		"	"	City of New York	" 30	" 14	314 47	Nov. 14	" 27, ..	" 29, ..	" "
11	"		"	Glasgow	Columbia	" 9	" 3	74 58	" 3	Jan. 8, ..	Jan. 29, ..	" "
7	"		"	Liverpool	The Queen	" 27	" 14	164 85	" 16	" 18, ..	" " ..	" "

10 *Bill of particulars.*

Superior court, city of New York.

CARL L. RECKNAGEL ET AL.
against
THOMAS MURPHY, LATE COLLECTOR OF THE customs of the United States at the port of New York.

SIR: Please to take notice that the following is the bill of particulars of items of the plaintiff's demand in the above entitled action, to wit, moneys exacted by compulsion and duress, and under color of the revenue laws of the United States, by the defendant as collector, as aforesaid, from and paid by the plaintiffs on merchandise imported by the plaintiffs, as per schedule hereto annexed, with legal interest on said amount from the date of payment thereof, as aforesaid.

Dated New York, February 8, 1873.

Yours, &c.,

STANLEY, BROWN & CLARKE,
Plaintiff's Attorneys, No. 16 Wall st., New York.

To GEO. BLISS, Jr.,
Defendant's Attorney.

(Indorsed:) 2172. N. Y. superior court. Carl L. Recknagel et al. against Thomas Murphy, late collector of the customs of the United States at the port of New York. Bill of particulars. Stanley, Brown & Clarke, attorneys for plaintiff, No. 16 Wall st., N. Y. Feb. 8, '73.

11 U. S. circuit court, for the southern district of New York, in the second circuit.

Pleas before the judges of the circuit court of the United States of America for the southern district of New York, in the second circuit, at the United States court buildings in the city of New York, of the term of April, 1875, to wit, of the twenty-third day of April, in the year of our Lord one thousand eight hundred and seventy-five.

Witness the honorable Alexander S. Johnson, one of the judges of the said circuit court.

JOHN I. DAVENPORT, *Clerk.*

SOUTHERN DISTRICT OF NEW YORK, *ss:*

Be it remembered, that heretofore, to wit, on the 23rd day of April, 1875, in April term of the year 1875, before the judges of the circuit court of the United States of America for the southern district of New York, in the second circuit, at the United States court buildings, in the city of New York, came Carl L. Recknagel, Albrecht Pagenstecher, and Rudolph Pagenstecher, by Stanley, Brown & Clarke, their attorney', and brought into the said court, before the aforesaid judges thereof, then there, their certain declaration against Thomas Murphy, being in custody, &c., of a plea of trespass on the case upon promises; which said declaration follows in these words, that is to say:

12 **THE UNITED STATES OF AMERICA:**

Circuit court of the United States for the southern district of New York, in the second circuit, of the April term, in the year one thousand eight hundred and seventy-three.

CARL L. RECKNAGEL ET AL.
vs.
THOMAS MURPHY.

Carl L. Recknagel, Albrecht Pagenstecher, and Rudolph Pagenstecher, copartners doing business under the firm name of Recknagel & Co., plaintiffs in this suit, came into court, and, by Stanley, Brown & Clarke, their attorneys, give the court now here to be informed that heretofore, to wit, on the twenty-eighth day of December last past, this action was commenced in the superior court of the city of New York, according to the laws of the State of New York, and the rules and practice of said court, in favor of the said plaintiff against the defendant herein upon the causes of action hereinafter set forth, and the summons therein filed with the clerk of said court; that the defendants afterwards, by his attorney, George Bliss, jr., esquire, duly appeared
13 in said action, and thereupon on the nineteenth day of May, in
the year one thousand eight hundred and seventy-three, the said action was duly removed by writ of certiorari for further prosecution into this court, according to the act of Congress in such case made and provided; and the clerk of the said court did thereupon return the said writ with the said summons, and duly filed the same in this court, which allegations the defendant admits to be true.

Wherefore let the further proceedings and trial in this action be continued in this court.

And the said plaintiffs, by their said attorneys, complain of said defendant of a plea of trespass on the case for promises, for that whereas said defendant, on the 28 day of December, eighteen hundred and seventy-two, at New York City, in the district aforesaid, was indebted to said plaintiff in the sum of thirty thousand and $\frac{00}{100}$ dollars lawful money of the United States of America, for duties on merchandise, to wit, argols and divers other articles imparted into and entered at the
14 collection district of the United States for the city of New
York on or about the first day of December, 1870, and on divers other days and times thereafter, and until the first day of November, in the year one thousand eight hundred and seventy-one, in the following vessels, to wit: Italy, Denmark, England, Holland, Virginia, France, Scotia, The Queen, Batavia, Spain, City of New York, Pennsylvania, and divers other vessels from Liverpool; Trojan, from Trieste; Ismalia, Donau, Dacian, and divers other vessels, from Marseilles; Helvetia, Erin, Paraguay, The Queen, Parama, and divers others, from London; Teresina, Finella, from Naples, Deutschland, Pennsylvania, Assyria, from England; Bremen, from Bremen; Iowa and Columbia, from Glasgow; Trojan and Luigui, from Palermo; unlawfully demanded, exacted, and received at said New York City, by the said defendant, then collector of the customs for said district, under color of a law of the United States for the collection of duties on imports, and paid by the said plaintiffs under protest and appeal in writing in due form of law.

And being so indebted, he, the said defendant, in consideration
15 thereof, afterwards, to wit, on the same day and year last afore-
said, at the place aforesaid, undertook and then and there faith-

fully promised the said plaintiff well and truly to pay unto the said plaintiff the said sum of money when he, said defendant, should be thereunto afterwards requested.

And whereas also the said defendant afterwards, to wit, on the same day and year last aforesaid, at the place aforesaid, was indebted to the said plaintiff in the further sum of thirty thousand dollars lawful money of the United States of America, for money before that time lent and advanced by said plaintiff to said defendant, and at the special instance and request of the said defendant. And for other money by the said plaintiffs before that time paid, laid out and expended for the said defendant, and at the like request of the said defendant. And for other money by the said defendant before that time had and received to and for the use of the said plaintiff. And being so indebted the said defendant, in consideration thereof, afterwards, to wit, on the same day and year last aforesaid, and at the place aforesaid, undertook and then and there faithfully promised the said plaintiff well and truly to pay unto the said plaintiffs the said sum of money in this count mentioned, when he should be thereunto afterwards requested.

16 Nevertheless, said defendant (although often afterwards requested so to do) has not paid said sums of money, or any or either of them, or any part thereof, to the said plaintiffs; but to pay the same, or any part thereof, to the said plaintiffs, has hitherto refused, and still does refuse, to the damage of the said plaintiffs of forty thousand dollars, and therefore the said plaintiffs bring suit, &c.

STANLEY, BROWN & CLARKE,
Attorneys for the Plaintiffs.

(Endorsed:) 2172. U. S. circuit court. Carl L. Recknagel et al., vs. Thomas Murphy. Declaration.

To GEORGE BLISS, jr., esq.,
Def't's Att'y:

SIR: Please take notice that a rule has been entered in the book of common rules in the office of the clerk of this court, at the city of New York, requiring the defendant to plead to the declaration in twenty days after service of a copy thereof, and notice of said rule on his attorney, or judgment, &c.

New York, August 30, 1873.

STANLEY, BROWN & CLARKE,
17 *Attorneys for Plaintiffs*, 16 *Wall St.*

Received Sep. 9, 1873.
U. S. attorney's office.

18 *Plea.*

United States circuit court, southern district of New York.

THOMAS MURPHY
ads.
CARL L. RECKNAGEL AND AL.

And the said defendant, Thomas Murphy, by George Bliss, his attorney, comes and defends the wrong and injury, when, &c., and says that he did not undertake and promise in manner and form, as the said plaintiffs in this suit have above thereof declared against the said defendant, and of this he puts himself upon the country, and the said plaint

iffs doth the like, &c.; and for a further plea in this behalf, and by leave of the court here first had and obtained, the said defendant says that the said plaintiffs ought not to have or maintain their action aforesaid therefore against him, because he says, after the making of the said several promises and assumptions in the declaration aforesaid set forth, and before the commencement of this suit, to wit, on or about the 10 day of October, 1872, at New York City, he, the said defendant, fully paid and satisfied the said plaintiffs, all and singular, the said sums of
money in the said declaration specified and set forth, and this he
19 is ready to verify. Wherefore he prays judgment if the said
plaintiffs ought to have or maintain their action aforesaid against him.

And a further plea in this behalf by leave of the court here first had and obtained, the said defendant says that the plaintiffs ought not to have or maintain their action aforesaid thereof against him, because he says that heretofore, to wit, on or about October 10th, 1872, at the southern district New York, in the second circuit, and in the circuit court of the United States, by the determination and consideration of this the said court, the said defendant impleaded by the said plaintiffs an action in said court brought by said plaintiffs for the purpose of obtaining the several sums of money in the aforesaid declaration in this action set forth, received a final order of this the said court therein, whereby the said suit was forever settled, compromised, and disposed of, and which said final order or determination was made and had by and because the said plaintiffs and defendant in said suit did then and there finally and solemnly agree that the matters in dispute in said suit should be then and there and thereby finally and forever settled by and between the
said plaintiffs and the said defendant, whereupon, and with the
20 assent of this defendant, said plaintiffs did then and there cause
to be entered and recorded the said order or final determination of said court, which otherwise, or but for the said final agreement, the said order or final determination would never have been made, but which is nevertheless still in full force and effect, not set aside or made void, and this he is ready to verify.

Wherefore he prays judgment if the said plaintiffs ought to have or maintain their action aforesaid against him.

And for a further plea in this behalf, by leave of the court first had and obtained, the said defendant says that the plaintiffs ought not to have or maintain their action aforesaid thereof against him, because he says that he, the said defendant, paid to the said plaintiffs the sum fifteen thousand dollars, or thereabouts, for and in full satisfaction and discharge of the said sums of money, undertakings, promises, and grievances in the said declaration mentioned, and which said sum they, the
said plaintiffs, then and there accepted and received of and from
21 the said defendant in full satisfaction and discharge of the said
sums of money, undertakings, promises, or grievances. And this he is ready to verify.

Wherefore he prays judgment if the said plaintiffs ought to have or maintain their action aforesaid against him.

GEORGE BLISS,
Defendant's Attorneys.

(Endorsed:) 2172. U. S. circuit court. Thomas Murphy ads. Carl L. Recknagel. Pleas.

UNITED STATES ATTORNEY'S OFFICE,
New York, Sept. 29, 1873.

Messrs. STANLEY, BROWN & CLARKE,
Defendant's Attorneys.

SIRS: Take notice that within is a copy of the plea in the action above entitled, which has been filed in the office of the clerk of the circuit court of the United States for the southern district of New York, in the second circuit, to which you are hereby required to reply 22 within twenty days from the day of service hereof upon you, exclusive of the day of service, and to serve a copy of your reply upon the subscriber, at his office, 41 Chambers street, in the city of New York, New York, otherwise judgment will be entered against the above named for the costs of this action.

Yours,

GEORGE BLISS,
United States Attorney for the So. District of New York.

NEW YORK, , 187 .

Due service of the copy of the defendant's plea within, and of the notice above, admitted this 29 day of September, 1873.

STANLEY, BROWN & CLARKE,
P'ffs' Attorney'.

23 *Replication.*

United States circuit court, southern district of New York.

CARL L. RECKNAGEL ET AL.
vs.
THOMAS MURPHY.

And the said plaintiffs, as to the plea of the said defendant by him first above pleaded, and whereof he hath put himself upon the country, doth the like.

And the said plaintiffs, as to the said plea of the said defendant by him secondly above pleaded, say that the said plaintiffs, by reason of anything by the said defendant in that plea alleged, ought not to be barred from having and maintaining their aforesaid action thereof against the said defendant, because they say that the said defendant did not pay the said several sums in said plea referred to in full satisfaction and discharge of the said several promises, assumptions, and undertakings in the said declaration mentioned, in manner and form as the said defendant had above in his said plea in that behalf 24 alleged, and this the said plaintiffs pray may be enquired of by the country, &c.

And the said plaintiffs, as to the said plea of the said defendant by him thirdly above pleaded, say that the said plaintiffs, by reason of anything by the said defendant in that plea alleged, ought not to be barred from having or maintaining their aforesaid action thereof against the said defendant, because they say that the said plaintiffs and the said defendant did not agree that the matters in dispute in the suit in said plea mentioned should finally and forever be settled in manner and form as the said plea in that behalf alleged.

And this the said plaintiffs pray may be inquired of by the country, &c.

And the said plaintiffs, as to the said plea of the said defendant by
him lastly above pleaded, say that the said plaintiffs, by reason of anything
by the said defendant in that plea alleged, ought not to be barred
from having and maintaining his aforesaid action thereof against the
said defendant, because he saith that the said plaintiffs did not accept
or receive the said sum of fifteen thousand dollars in the said plea
25 mentioned, or any part thereof, in satisfaction or discharge of the
said several promises, undertakings, or grievances in the said
declaration mentioned in manner and form as the said defendant hath
above in his said plea in that behalf alleged.

And this the said plaintiffs pray may be enquired of by the country, &c.

STANLEY, BROWN & CLARKE,
Pl'ffs' Att'ys.

(Endorsed:) Carl L. Recknagel et al. vs. Thomas Murphy. Replication. Stanley, Brown & Clarke, pl'ffs' att'ys. No. 16 Wall st., N. Y. To Geo. Bliss, esq., U. S. att'y. Received Oct. 18, 1873. U. S. attorney's office.

26 Therefore the issue above joined is ordered by the said circuit
court to be tried at the circuit court appointed to be held at the
United States court building in the city of New York on the first Monday
of April, 1875.

And now, at this day, to wit, the first Monday of April, 1875, before
the said judges of the said circuit court, at the United States court
building in the city of New York, comes the said defendant, by his attorney
aforesaid, and the Hon. William J. Wallace, district judge of the
United States for the northern district of New York, in the second circuit,
before whom the said issue was tried, hath sent hither his record
had before him in these words: Afterwards, that is to say, on the
twenty-third day of April, 1875, and at the place before mentioned, before
the Hon. William J. Wallace, district judge of the United States
for the northern district of New York, in the second circuit above named,
according to the form of the statute in such case made and provided,
came as well the above named plaintiffs as the above named defendant,
by their respective attorneys aforesaid; and the jurors of the jury summoned
to try the said issue being called also came, who, to speak the
truth of the matters aforesaid, being chosen, tried, and sworn, say, upon
their oath, that the said defendant did not undertake and promise
27 in manner and form as the said plaintiffs have above complained
against him.

Therefore it is considered that the said plaintiffs take nothing by their said declaration, but they be in mercy, &c., and that the said defendant go thereof without day, &c. And it is further considered by the said court now here that the said defendant recover against the said plaintiffs ninety-five dollars and forty-one cents for his costs and charges by him about his defense in his behalf laid out and expended by the said court here adjudged to the said defendant, and with his assent, according to the form of the statute in such case made and provided, and that the said defendant have execution thereof.

Judgment signed this 8 day of May, 1877.

J. M. DEUEL, *Dep. Cl'k.*

(Endorsed:) 2172. U. S. circuit court, southern district of New York. Thomas Murphy ads. Carl L. Recknagel & al. Judgment record. Stewart L. Woodford, United States attorney for the southern district of New York, U. S. circuit court. Filed May 8, 1877. John I. Davenport, clerk.

28 *Bill of exceptions.*

U. S. circuit court, southern district of New York.

CARL L. RECKNAGEL, ALBRUCHT PAGENSTECHER, and Rudolph Pagenstecher
against
THOMAS MURPHY.

This cause came on for trial at a circuit court of the United States held at the city of New York before his honor, Mr. Justice Wallace and a jury on the 25th day of April, 1875, and the plaintiffs to sustain the issues on their part proved that they were copartners at the several dates referred to in the declaration and bill of particulars, and that they made the several importations referred to in the invoices therein mentioned into the port of New York from Europe at or about the dates therein stated.

Plaintiffs' counsel read in evidence the invoice of the several importations bearing date, respectively, as in the said bill of particulars set forth, and also entries of the said merchandise upon the said in-
29 voices which were made at the custom house in New York, in due form of law of the respective dates set forth in said bill of particulars.

Plaintiffs further proved that the defendant, then collector of the port of New York, exacted a duty from the plaintiffs upon all of said importations of six cents per pound.

The defendants further proved that on the importation by the Italy, described in the invoice bearing date October 19th, 1871, and by the City of New York, described in the invoice of the 30th of October, 1871, and by the Columbia, described in the invoice of October 9th, 1871, and by the Queen, described in the invoice of October 27, 1871, the amount of the exaction by the defendant at six cents a pound on said importations was $1,138.42 at the several dates specified in said bill of particulars. That at the several times of the payments of the said duties on the said importations by the said Italy, City of New York, Columbia, and Queen, the plaintiffs protested in writing as follows:

NEW YORK, *Dec.* 27, 1871.

30 SIR: *The* protest against the assessment of duty at 6 cents per lb. upon the argols imported by us in the City of New York from Liverpool and entered for consumption November 14th, 1871, *he* cause the act of July 14, 1862, section 5, as far as it relates to argols or crude tartar is repealed by the act of July 14, 1870, section 22. We pay under duress to get our goods.

RECKNAGEL & CO.,
By CHASE, HARTLEY & COLEMAN,
51 *William St.”*

COLLECTOR OF CUSTOMS,
New York City.

The prosests on the importations by the Italy, Columbia, and Queen, were in all respects like the above protest. And which writing was made and delivered to the defendant at the several times of such payment, and on the same day plaintiffs duly appealed to the Secretary of the Treasury from the decision of the collector directing such payment.

And plaintiffs then proved that no answer had been made by the Secretary of the Treasury to either of said appeals when this suit was brought which was on the 28th day of Dec'r, 1872.

31 That in respect to the importations set forth in said bill of particulars other than the four above specifically named the plaintiffs proved that they duly protested as aforesaid and appealed from the decision of the collector sustaining the exaction, and then offered in evidence as a decision of the Secretary of the Treasury, from the date whereof the right to commence suit began, the following letter, to wit:

TREASURY DEPARTMENT,
Washington, D. C., October 1, 1872.

COLLECTOR OF CUSTOMS,
New York:

SIR: I am in receipt of your letter of the 27th instant reporting further in regard to the appeal (5,850,) of R. D. Jackson from your assessment of duty at the rate of 6 cents per pound on certain brown argols imported by him as therein set forth.

Upon further consideration of department's decision of January 28th, 1871, under which these duties were charged, the department is satisfied that the position therein taken would not be sustained by the courts,
inasmuch as it would seem to be clear that the provision in the
32 act of July 14, 1862, imposing 6 cents per pound duty on argols
or crude tartar is wholly repealed by the act of July 14, 1870.

The provision in the act of August 5, 1861, by which all argols were charged with 3 cents per pound duty is however regarded by the department as still in force so far as partially refined argols are concerned, and you will therefore hereafter assess that rate of duty on this class of merchandize. You will also take necessary steps to refund the excess of duty beyond the rate on prior importations where the provisions of the 14th section of the act of June 30th, 1864, have been fully complied with.

I am, very respectfully,
WM. A. RICHARDSON,
Acting Secretary.

To the admission of this letter the defendant's counsel objected as immaterial and irrelevant and not responsive to any of the plaintiffs' appeals.

The court excluded the letter as evidence, and plaintiffs' counsel duly excepted to the ruling.

The plaintiffs' counsel then called as a witness—

R. OGDEN DOREMUS, who, having been first duly sworn, testified as follows:

Q. What is your occupation?
33 A. Professor of chemistry at the Bellevue Medical College and at the New York City College.

Q. What experience have you had in practical chemistry, and to what extent are you familiar with the subject?

(It is admitted that Professor Doremus is a chemical expert.)

Q. Will you be kind enough to look at samples Nos. 1, 2 and 3, of the article now produced?

A. This I would term the crude argols, sometimes called crude tar-

tar, a substance which is obtained from wines after they have stood for a while. In the process of fermentation the alcohol increases in quantity, coming from the sugar. In the fermentation of the wine the sugar, which otherwise would hold the tartrate in solution, is changed into alcohol and that causes a precipitation of a compound of tartaric acid, potash, lime, and coloring matter from the wine. If it be a white wine very little coloring matter is precipitated; if a red wine, considerable. You notice the crust in a bottle of old wine, where it has been standing for a time, and the alcohol is increased in quantity. The liquid
34 inside of the bottle, which is so valued by connoisseurs in liquor,
shows the deposition of a crust; that crust is tartaric acid united with potash and with lime; and when the wines have fermented in making wine on a large scale, great quantity of this material is deposited, from three to five pounds, perhaps, to the hundred gallons, with a deposition at the time of more or less of coloring matter, depending on the variety of wine and the depth of color of the wine.

Q. To what extent are you personally familiar with this article practically?

A. It is used very largely.

Q. No; your personal acquaintance with this article. State what it is so that the court and jury may understand to what extent you know about this article.

A. In its present condition it is of no use to the chemist.

The COURT. It is assumed that he is an expert.

Q. Please state in a word, if you can, to what extent.

A. In this country they seldom save the argols; very much as in the conservation of milk, we take the butter and cream; but we don't take the sugar of milk as they do in Europe; we cast the argols
35 aside. But plans have recently been formed for effecting this on
a large scale in the West, for the conservation of this argol in order to prepare the bitartrate of potash, which is so very useful for many purposes, as for raising bread, the preparation of certain medicines, &c., instead of importing the article.

Q. And you have had personally to do with that matter?

A. Yes, sir.

Q. You have spoken of crude argols or crude tartar (objected to). Please state whether or not those words are synonymous.

The COURT. Ask him if there is any difference between argols and crude tartar.

The COURT. He may state the difference between argols and crude tartar.

A. They are synonymous terms. We speak of crude tartar or argols.

Q. (By the COURT.) You mean to say this, that chemically there is no difference between the article that is known as crude tartar and the article which is known as crude argols?

A. As argols, the terms are synonymous.

Q. I understood you to say that *w*ere was no difference between argols & crude tartar.

A. No, sir; there is not.

By Mr. STANLEY:

Q. Is there any difference between crude argols and crude
36 tartar?

A. No difference; crude argols, argols, crude tartar. They are commonly known under those three terms.

Q. Will you please look at sample 1, which you have there, and state what process, if you can tell, it has been subjected to, not to you, but as you see it.

A. It is to the eye colored, and theretofore it has not been purified. And by testing I find that it yields a copious precipitate of lime, showing that it is a mixture of the tartrate of potash with tartrate of lime. The process of purifying this is to boil it, with prolonged boiling; by setting it aside to crystallize, sometimes boiling it a second time and adding some clay. The alumina of the clay falls, and with it carries the clayey matter. It is then set aside to crystallize, and from that clear crystals of the bitartrate of potash are formed. This is called by another name; and then when it is pulverized it is called again by another name; it is bitartrate of potash, or tartar; or, when it is the pulverized in a fine state it is the cream of tartar. This substance is a mixture of the tartrate of lime with the tartrate of potash and coloring matter. In
37 the article that is purified you have the lime removed and you have
the coloring matter removed; then it is in a crystalline form, and when pulverized it forms the cream of tartar, which is used in medicine, mixed with Rochelle salts, mixed with antimony to form tartar-emetic, and with a compound of iron tartrate of iron, and is used extensively in baking bread.

Q. Where just taken from the wine butts and, as you can say, boiled, is it boiled in water?

A. Boiled in water.

Q. (By the COURT). Is that the article as it is taken from the wine butts?

A. It may have been that some partial impurities have been removed, or something of that kind, but it is not the purified article; its color demonstrates that; and the precipitate which I notice here, which is the oxalate of lime, shows the abundance of lime it contains.

Q. Is there or not any chemical change in the article, from the boiling in the water?

A. If the boiling is prolonged then one of the substances dissolves more readily than the other. The tartrate of potash dissolves more readily than the lime.

38 Q. What is taken out of the article as it comes from the butt,
or wine cask, by the first boiling?

A. As I just said, the tartrate of potash is more soluble than that of the lime, and we remove one of these tartrates, therefore, by prolonged boiling in part.

Q Is the sediment and earthy matter simply taken out by the boiling?

A. That is done by its being decanted and crystallized.

Q. It is always decanted and crystallized?

A. Yes, sir.

Q. What is the process that it undergoes at last, after these boilings, to make it cream of tartar?

(Objected to, as already answered; excluded.)

Q. What do you say in regard to any of those articles before you, those samples, having gone through any process of refinement?

A. I cannot answer further than that they have been subjected to washing simply to wash away the dirt and common impurities. It is of no use in its present state, until it is purified; containing, as I said, apparently, a high color, and giving precipitates of lime. If the
39 argol is obtained from a white wine, then it is a light color; if from
a red wine, a dark color.

R. OGDEN DOREMUS recalled.

Cross-examined by Mr. TREMAIN:

Q. What you have stated, have you stated as a scientific man?

A. I have, sir.

Q. What you have stated of the properties of the different forms of tartar which you have described you have stated in respect to their use in the laboratory, and their chemical constituents?

A. Yes, sir; also as to their use in the arts.

Q. In your testimony did you mean to refer specifically to the use of the different forms of tartar in manufactures and in commerce as the result of your experience or simply theoretically?

A. Simply from my theoretical knowledge, knowledge from the books.

Q. You don't mean to speak from the result of your experience?

A. I don't mean to say that I am a dyer or that I use it as a merchant, nor do I prepare cream of tartar as a druggist, though I am familiar with the process.

Q. In respect to the article itself, have your dealings with it
40 been confined to the laboratory?

A. They have, sir; excepting that, as I stated to you, I was interested in a patent for the conservation of argols and of tartrate of potash here, on quite a large scale, in our own country, that is to so great an extent neglected.

Q. But your use of them in your own experience has been confined to the laboratory?

A. Yes, sir; perhaps I might add to that that in some few cases, during the last 5 years, this subject has come up in cases where the tartrates are used and acid phosphates of lime involving cognate questions or subjects.

Q. In respect to your testimony in this particular case, let me ask to what point your attention has been directed, and when?

A. Yesterday morning I had samples exhibited to me of the materials.

Q. The particular samples here?

A. These are some of them; there are some others that are of a dark red color.

Q. To what particular point was your attention directed?

A. As to what these should be properly termed.

41 Q. In commerce or in respect to their constituents?

A. In respect to both, sir.

Q. Do you mean to testify in respect to their commercial terms as the result of your experience, or do you desire to confine your testimony to their chemical constituents as the result of your scientific knowledge and experience?

A. I am not an importer of the article; I have merely known the names that are commercially used to express these substances. I am not a dealer in them.

Q. Then, if I understand your answer, you speak only in respect to their chemical constituents, so far as the names are concerned?

A. Not entirely; I speak of them not only chemically but as to how they are recognized by us in commerce, though I am not a dealer in the article.

Q. Then your testimony in that respect is confined to your knowledge as a scientific man?

A. Yes, sir.

Q. And from the general use of those terms in books and essays relating to them?

A. Yes, sir.

Q. Is the term "tartar" a general term, or is it a specific term?

A. It is a general term.

42 Q. Are there, or are there not, a great many forms of tartar known, generally and in the laboratory?

A. There are, sir.

Q. Do these different forms of tartar enter into different manufactures and into consumption for different purposes?

A. They do.

Q. Is cream of tartar one of those forms?

A. It is.

Q. Are all the forms of tartar derived from the same source, namely, the deposits on wine casks?

A. They are, sir.

Q. How are those different forms of tartar distinguished by their chemical properties?

A. You mean as to the name simply?

Q. No, sir; I don't mean as to the name.

A. They are distinguished by their different chemical constitutions.

Q. Please state to what process you subjected portions of the samples that have been exhibited in this case.

A. In the way of testing?

Q. Any process; not the result, but to what process you subjected them.

A. I dissolved them in hot water after pulverizing.

Q. You pulverized them first?

A. Yes, sir.

43 Q. And then dissolved them in hot water?

A. Yes, sir; I then tested specially for the lime.

Q. You precipitated the lime?

A. Yes, sir.

Q. By what?

A. I precipitated the oxalate of ammonia, which gives a white precipitate, which I exhibited to the jury yesterday in the test tubes.

Q. Will you be good enough to say which sample by its number you used for that purpose, or whether you mixed them altogether?

A. I didn't treat the whole of them; the first, second, third, and fourth.

Q. Did you mix them all in the same operation?

A. No, sir; they were all in separate test tubes. No. 1 is the one testified to yesterday.

Q. No. 1, did you weigh the quantity of this that you tested?

A. I merely made a qualitative analysis; merely pulverized it, dissolved it in water, and then tested it.

Q. Did you weigh the quantity that you commenced to work with?

A. Not yesterday.

Q. Have you since?

A. I have since; No. 1.

44 Q. In the test you exhibited yesterday?

A. No, sir.

Q. Are you prepared here to exhibit a test?

A. No, sir; I didn't bring anything. I was not aware that it was desired on cross-examination, or I would have done so.

Q. How much did you take this morning of this?

A. Last evening I had a sample, one drachm; that is, about 15 grains.

Q. Did you subject that to the process you have just described—the same process you showed yesterday?

A. Yes, sir; that is, I pulverized it, dissolved it in hot water, cooled the water, precipitated then the oxalate of ammonia with a little additional ammonia, so as to get the white precipitate, the exalate of lime.

Q. Did you weigh the lime?

A. I have not finished it as yet; it takes two days. I have not made a quantitative analysis of it.

Q. As it at present stands, all you can say is that there was some lime precipitated?

A. Yes, sir.

Q. You cannot give the quantity?

A. No, sir.

45 Q. Can you give the apparent volume of the precipitate?

A. The apparent quantity?

Q. Yes, as compared with the original amount of tartar.

A. I can only give a guess, an approximation.

Q. Is cream of tartar only a powder?

A. The general definition in regard to cream of tartar is, that it is in a pulverized state; sometimes they call the pure crystals cream of tartar, as I stated to the court and jury yesterday; they obtain pure crystals of tartarate of potash and then these are subjected to pulverization, and in that powdered form are known as cream of tartar.

Q. You do not mean to give the commercial names of those articles now, do you?

A. Those are the commercial names, cream of tartar; chemically, pure bi-tartrate of potash.

Q. That includes both the crystal and the powder?

A. They are both the same in chemistry, both *by* tartrate of potash.

Q. And in respect to their forms, crystal or powder, the chemical constituents are the same in each?

A. Precisely the same, merely a difference in physical condition.

46 Q. Have you ever had any practical experience in testing cream of tartars with a view to their use in the arts or in manufactures?

A. Merely as an analytical chemist, to determine their substances.

Q. What particular test are they subjected to in order to ascertain the quantity of bi-tartrate of potash?

A. We test for the purity of the substance.

Q. What do you mean by that?

A. We test for the tartrate of lime, which occurs, as I said yesterday, in the original deposit, so that we have a double salt, the tartrate of lime and the tartrate of potash. Then we are apt to have some foreign matters, such for instance as magnesia; we are apt to have some oxide of iron, and sometimes starch, and any white powder that resembles it. It is largely adulterated in that way.

Q. The point of my enquiry is, what is the particular constituent that indicates its purity?

A. We test for two things, for the lack of adulterations, or not strictly adulterous—lack of thorough purification; then we test for the bi-tartrate of potash as one substance, and we test also for the tartaric acid.

Q. Tartaric acid is united with the potash?

47 A. Yes, sir.

Q. Forming the bi-tartrate of potash?

A. Yes, sir.

Q. Does or does not the purity of the article depend upon the quantity of bi-tartrate of potash?

A. Certainly, sir.

Q. What is the ordinary amount of bi-tartrate of potash in the cream of tartar that is used in the laboratory for practical purposes?

A. You mean the acid alone?

Q. No, sir; the bi-tartrate of potash.

A. Both together?

Q. Yes. sir; what percentage?

A. Sometimes as high as 98 to 99 per cent., sometimes considerably lower. It varies considerably.

Q. I am asking you simply, for practical purposes in the laboratory, about what would be the range?

A. From 90 to 98 per cent.

Q. Wouldn't it be from 95 to 98 per cent. generally?

A. Sometimes we have it a good deal worse than that; I should say from 90 to 98.

Q. And the samples that ran, say 90, would be a fair cream of tartar, but rather low in grade, or would it be very low?

48 A. I think it would be very poor—not very poor; it would be a poor article.

Q. It could be used?

A. Yes, sir. I should perhaps add to that answer that perhaps there is no business where goods are more extensively adulterated, so far as my experience goes, than in the matter of drugs, and in order to prevent that we had a general law to examine all the drugs that were brought into the market, and subsequently ingenious devices were adopted for adulterating them, and having been 12 years in the College of Pharmacy, my attention has been specially directed to that subject.

Q. That alteration is more frequent in the pulverized article than in the crystal?

A. Yes, sir; I have had samples of oxide of lead, and when I came to analyze it and subject it to a practical test there was not a particle of lead in it.

Q. If you should subject the cream of tartar to the process you have described either in the crystalline or pulverized state with, say, a percentage of anywhere between 90 and 98 per cent. of bi-tartrate of potash, would, or would not, lime result as one of the precipitates?

49 A. There always is a little lime; almost always a little trace of lime as I showed yesterday in the test-tubes here.

Q. In the preparation of the cream of tartar of commerce, either in the crystalline or pulverized form, is there, or is there not, in the process of recrystal'ization some foreign substance added to it?

A. Yes, sir.

Q. Is not that lime?

A. Clay is added.

Q. Does not lime appear as the result of the addition of the clay and other substances used in the recrystallization?

A. It ought not to be so.

Q. You spoke yesterday of a refinement and of a crystallization of tartar in the process of its preparation in different forms for commerce.

A. Yes, sir.

Q. Do you make any distinction between refinement and crystallization in the use of those terms as applied to the processes?

A. The original article that is deposited in the wine is deposited some part of it in crystals, but it is still in a crude state, and yet by dissolution it may be crystallized again and not be made the refined article; crystallization does not necessarily produce purification.

Q. But is not the crystallization a mere synonymous term for
50 a refinement of the article?

A. No, sir; the original deposit is a crystallization, yet it is not a refined article. The original lees of wine contain crystals.

Q. Taking the original article and subjecting it to this first process with a view of obtaining crystals, is not this particular process a process towards refinement, a partial refinement?

A. It is, sir, because it removes the dust and dirt and a certain amount of lime.

Q. As the result of that one process crystals are formed, are they not?

A. Yes, sir; but please not understand me that every process of crystallization is refinement.

Q. It is one step in the process of refinement, is it not?

A. The first dissolution and crystallization is a process of refinement.

Q. And if you take those same crystals and subject them to another washing—to another process just the same substantially, is not that another step towards a refinement?

A. Yes, sir.

Q. And as the result of that, are there not crystals formed in the same way?

A. There are.

51 Q. If you take those same crystals and subject them again to the same process do you not advance one more step toward recrystallization or refinement?

A. We do.

Q. Is not the number of those processes or steps one of the criteria by which the degree of refinement is in part to be judged?

A. In part, and yet not strictly, for by an adroit method they can now introduce with the crystals such as are here shown other crystals. So that all crystallization is not strictly refinement, but as a general statement the separate processes of crystallization are processes of refinement, but it is not strictly or chemically true, for you can adroitly introduce other crystals, and thus make an adulteration.

Q. (By the court.) Do you mean to be understood that these samples have undergone a process of refineing?

A. They have undergone this step; they have been treated with water, as I stated yesterday, to wash away many of the impurities.

Q. Look at sample 1 and say if you can state by looking at that sample whether it has been treated or not.

52 A. I should state, as I stated yesterday, that this has been treated with water.

Q. I understood you to say yesterday that it has been washed.

A. Yes, sir.

Q. Please explain what you said yesterday and how you are enabled to state that that particular sample has been washed.

A. The lees of wine contain a variety of substances such as glucose, and a variety of impurities with particles of dirt, dust, silicate, sand, and things of that nature, and that treatment with water is to remove those and produce this article, which is not the refined tartar, but crude tartar.

Q. I ask what you meant by washing; what is this process which you describe as washing?

A. I think I have just described that.

Q. Is it the process that occurs in the boiling water?

A. Yes, sir; we treat it with water and then separate the impurities.

Q. The original deposit upon the sides of the casks or butts of wine is what you call the lees, isn't it?

A. Yes, sir.

Q. When a crust of that sort is obtained, that is the crudest possible form, isn't it?

A. Yes, sir.

53 Q. Then it is treated by being washed by boiling water placed in solution, and as the result of that process crystals are formed?

A. Yes, sir.

Q. Is sample 1 such a crystal?

A. That is my belief.

Q Has it been subjected to more than one such process, or have the crystals been redissolved and subjected to a second, third, or fourth such process?

A. I should say it had simply been dissolved in water but once and once crystallized. That is the first crystal'ization.

Q. It has been treated once?

A. Yes, sir.

Q. (By the court.) Does that apply to all the other samples?

A. I think it does.

Q. How many times is that process repeated generally when it is treated, say, with pipe-clay, or bone-black, in order to form the lowest grade of cream of tartar?

A. I should suppose, at least—it is hard to say as to the lowest grade.

Q. 90 or 95 per cent.?

A. I should say at least two or three crystallizations were requisite; a treatment also with the clay or other things to decolorize it.

54 Q. Have you any practical knowledge of that process so as to speak of the value of the presence or absence of lime in the result?

A. No, sir; I have not.

Q. What is the percentage of bi-tartrate of potash in sample 1?

A. I have not made a quantitative analysis of it, nor of any of them; it is a matter that requires several days.

Q. From your general knowledge of an article of that character, like sample 1, what would be the lowest percentage of bi tartrate of potash it contains?

A. I could not give you an answer, sir; it would be impossible for me to state except by analysis.

Q. Would it not be above 75 any way?

A. It can be used as an impure article for adulterating purposes.

Q. In its present form can you answer whether it is or is not largely used in any particular manufacture?

A. Even the lowest are used to a certain extent.

Q. As to this particular article?

A. It has a certain use, but not the use in the sense of the refined article. That is what I meant by impure substances yesterday.

55 Q. Can you or can you not answer, as a practical man, as the re-

sult of your experience, whether the article like sample 1 is or is not largely used in its present form in practical manufactures?

A. I can make tartaric acid from that. I cannot use it in its present crude state, but I can extract from this a certain proportion of tartaric acid for my uses in the laboratory, and for the preparation of carbonate of potash.

Q. Would it not yield above eighty per cent. of tartaric acid?

A. I think it would.

Q. Now, would it not be above 85?

A. I merely take the general appearance of it.

Q. I mean from your knowledge, would it not be between 80 and 90 at least; as the result of your reading, about what would be the range?

A. I think 75 per cent. would be about the range.

Q. Would it not be very low?

A. That does not follow.

Q. It would be the lowest?

A. No, sir; I say it does not follow. I should judge it would be at least 75 per cent., but I do not know it as a fact; and I cannot know it as a fact unless I go through with an analysis.

Q. You cannot answer?

56 A. No.

Q. (By the court). 75 per cent. of what?

A. Bi-tartrate of potash.

Q. Is there or not in this first process of crystallization, of subjecting the crystals—the first crystals—to boiling, a chemical change?

A. Yes, sir. As I mentioned yesterday, the bi-tartrate of potash is more soluble in water than the lime, and it results in the partial removal of the lime.

Q. There is a complete separation and a redeposit?

A. There is a partial separation, and, as I explained yesterday, there is lime in this.

Q. There is a separation of the bi-tartrate of potash?

A. Yes, together with the bi-tartrate of lime. The two are combined, but a portion of the lime remains undissolved.

Q. I understand you to say that in its present state sample 1 was of no use. Do you mean by that that sample 1 cannot be used in the laboratory for any purpose whatever?

A. No, sir; I do not.

Q. Do you mean by that that it cannot be used in any process of practical manufacture?

57 A. It can be used as an adulterant, as they put other substances in, as for instance, in baking-powders.

Q. As the result of your experience can you answer whether the article like sample 1, in its present form, is or is not largely used in any practical manufactures, other than those you have mentioned?

A. Yes, sir; in the baking trade. Instead of using the pure article they introduce this impure article.

Q. Is it or not ground and used without any further crystallization or refinement?

A. It may be used for that particular purpose; I don't know that it is positively, but I should say that it might be.

Q. You cannot say?

A. No, sir. I should say it was an improper application of it; that it would be used then as an adulterant, but I have had no experience in using it as an adulterant.

Q. Is it, or is it not, in its present form when reduced to pulverization used, and largely used, in any other manufacture—practical manufacture—than baking powder?

A. As I have stated, it is used for making tartaric acid; it is
58 used for making cream of tartar; it is used for making Rochelle salts; it is used for making tartrate of antimony and potash, called tartar emetic.

Q. Is it not used in its present form for dyeing?

A. It may be used as a mordant likewise.

Q. Is it not?

A. I think it is.

Q. I show you a sample, which I will mark for the purposes of convenience, Def't's Sample 1. I ask you what that is; if that is cream of tartar?

A. It has the taste of it. I could not tell as to the purity by the taste.

Q. I didn't ask you that. Is it cream of tartar?

A. It has the taste of it. I taste distinctly the tartaric acid. I cannot distinctly say whether it is associated with potash or lime, or any other substance.

Q. But to the best of your judgment that is cream of tartar; is it not?

A. All I can state is that I can taste the tartaric acid in it.

Q. Can you distinguish any difference between it; that is to say, the sample in the paper and that in the bottle, without an examination?

59 A That has a little more acid than the other.

Q. Which?

A. This.

Q. You taste the tartaric acid a little stronger in Defendant's Sample 1. Is that what you mean?

A. Yes, sir; but I must demur to being called an analytical chemist by the tongue.

Q. I show you another sample which, for the purpose of convenience, I will call Defendant's Sample 2, a sample which you have produced, and ask you whether you are able to taste any difference between those two samples, except that the taste of the tartaric acid is a little stronger in Defendant's Sample 1?

A. Yes, sir; that may be a matter of imagination. though.

Q. I show you another sample, which I will call Defendant's Sample 3. I ask you what that is?

A. It looks like partially purified crystals of bi-tartrate of potash, but I must decline to have even what little opinion I have rest simply upon taste.

Q. Is it not purer, or stronger of tartaric acid than either of the other two pulverized samples?

A. There is less in one taste. The other is more like the tartaric acid.

60 Q. This particular sample, this sample 2 in the bottle, which you have produced, is that a sample which you are familiar with?

A. No, sir.

Q. Where did that come from?

A. From my laboratory.

Q. Do you know the percentage of bi-tartrate of potash in that, or about what it is?

A. I do not.

Q. What do you ordinarily buy for use in the laboratory—what do you want?

A. We want it as pure as we can get it; it varies. We get it sometimes 90, sometimes 99 per cent.

Q. This is about that, is it not?

A. I don't know.

Q. Have you ever bought an article for use in your laboratory of cream of tartar of any lower percentage than 97?

A. I do not know.

Q. (By the court.) I should like to know why it is that as a chemist you define the articles of which the samples are composed here as crude argols?

A. As an article distinguished from the refined article, would call this the crude.

Q. What is the refined article?

61 A. The refined article would be the tartrate of potash purified by these different processes which have been attended to. The original article is a settlement from wine, and that has been dissolved and crystallized and is sent here as the argols and is crude, in contradistinction to the purified article.

Q. (By the court.) As I understand you, you mean to be understood that there is a cruder article of argols than this?

A. Yes, sir.

Q. Is there not a cream of tartar in the crystal'ine form that is lower than this?

A. The article alluded to as lees of wine contains cellulose, glucose, and all these impurities.

Q. Is there not an article different from the lees of wine that is cruder than this particular sample, Plaintiff's Sample 1?

A. No, sir; not to my knowledge.

Q. Is there not an article between the lees of wine and Plaintiffs' Sample 1?

A. Not that I know of. If such exists I do not know it.

Q. Are the lees of wine when the crystals of them are cut off the crudest article?

A. That is the crudest form; that is the deposit in the wine casks.

62 Q. When the crystals are cut off?

A. Yes, sir.

Q. That is the crude?

A. That is the crude.

Q. Is that what you mean by the wine lees?

A. Yes, sir; it is called crust also.

Q. (By the court.) When it is cut off it is a crust, and that is the crudest form?

A. Yes, sir.

Q. Is this crust crystaline?

A. Partly; it is partly amorphous and partly crystaline.

Q. (Defendant's Sample 4 shown witness.) That is that?

A. This appears to me like the deposit of lees of wine.

Q. Can you tell me whether those are from the white or from the red wine lees?

A. It has the appearance of red wine; sometimes the red wine is very dark; there is a thousand shades.

Q. Can you tell whether plaintiffs' samples are from the red or white wine?

A. I should say from the white.

Q. All?

A. Not all I have seen.

Q. All the samples shown you, except this last one, seem to be from the white wine also?

A. Yes; these particular samples.

Redirect:

63 Q. Is the original crystal deposit deposited sometimes naturally in the wine cask, as pure as these samples?

A. No, sir; I should say not, because the wine has a variety of impurities that settle with it in the lees of wine, though there are crystals, as I have already said, mingled with it.

Q. Can it be told by any one, do you think, by inspection, whether these samples came from deposits in the bottom of the casks or on the sides?

A. No, sir; because they have been dissolved in water.

The plaintiff's counsel then called as a witness—

HERMAN WELL HAUSEN, who, having been first duly sworn, testified that he was the custom-house clerk of plaintiffs; that he entered the goods referred to in the several invoices and entries at the New York custom-house, and paid six cents per pound, the amount of duties exacted. He further testified, I saw the argols referred to in the invoices as soon as they came out of the vessel. I saw some of them also at the warehouse. I have no particular recollection of the goods in these particular invoices. I know that the goods referred to in the
64 invoices were argols; are always bought and sold as such. We
always sold argols by sample; samples are usually sent to us from the other side, and when they arrive here samples are then compared with the original samples. The samples produced are samples of these importations. They are taken at the time, labelled, and have been in plaintiffs' possession ever since they were received.

Plaintiffs' counsel then called as a witness—

RUDOLPH PAGENSTACHER, who, having been duly sworn, testified that he was one of the plaintiffs' firm and engaged in the business of importing and selling argols. That the practice of the firm now and in 1871 is and was to take samples of each importation immediately upon its arrival, and that the samples of argols produced were samples taken out at the time of the several importations referred to in the bill of particulars, and were true samples of those importations. Sample one is a sample of the importation by the Queen, Nov., 1871. Sample two is a sample of the importation by the Italy, November 6, 1871. Sam-
65 ple three is a sample of the importation by the Columbia. Sam-
ple four is a sample of the importation by City of New York, Nov., 1871. (Plaintiffs' counsel then offered the samples in evidence.) We always sell these goods as argols, and by sample, and not by any other name or in any other way.

Being cross-examined, the witness said: We sell argols directly to manufacturers. We sell for all kinds of purposes. We sell them to baking-powder men, to wool manufacturers, and to dyers. We sell them for manufacturing Rochelle salts and for other purposes, for making tartaric acid and cream of tartar.

The defendant's counsel then asked the witness the following question: Are these argols used for the same purposes as cream of tartar?

The plaintiffs' counsel objected to the question as immaterial. The court overruled the objection, and plaintiffs' counsel excepted. The witness said they were used by some for the same purposes as cream of tartar.

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66 as cream of tartar.

There is some difference in the value of these samples of argols which are produced. Their value depends upon their strength; that is, upon the quantity of the tartaric acid which they contain.

It is not easy to judge of the value by appearance; there is probably a difference of one or two cents a pound in the samples produced.

Being re-examined, the witness said the usual practice is for the purchaser to obtain samples and have them tested. Sometimes those just as they came out of the wine casks are more valuable than those that have been washed, because they have more tartaric acid, and the value depends entirely on that.

The plaintiffs' counsel then offered to prove that the argols set forth in the invoices referred to in the bill of particulars other than those by the Italy, City of New York, Columbia, and Queen, were crude argols and free of duty.

The court excluded the evidence on the ground that the action was
not commenced in time to permit plaintiffs to recover on these
67 these importations. And the plaintiffs' counsel duly excepted.

The plaintiffs' counsel then rested.

The defendant's counsel then called as a witness—

William M. Habirshaw, who, being duly sworn, testified as follows:

Q. What is your business?

A. I am a mechanical engineer and analytical chemist, doing business at New York City.

Q. And have been for years?

A. Yes, sir.

Q. It is a part of your occupation and in the line of your business to be consulted by manufacturers and by importers—merchants?

A. My business leads me to that.

Q. Upon chemical subjects?

A. Upon chemical subjects and upon the manufacturing of different chemical products. In regard to the article now before the court, I have given special attention to that subject.

Q. At the request of manufacturers?

A. At the request of manufacturers, importers, and others.

Q. Where were you educated?

68 A. I was educated in New York State. I might say, to establish myself before the court, that I am an analyst for the Chemical Board of New York, chemist of the New York Chemical Society, and fellow of the chemical societies of London and Berlin. I have had full charge of different manufactories making sugar, iron, &c., phosphates——

Q. You testify from practical experience and scientific knowledge?

A. From practical experience and scientific knowledge.

Q. Will you please look at plaintiff's samples 1, 2, 3, 4 and 5. I ask you whether you have made any examination of certain parts of the contents of those bottle, or of samples that were given you as from those bottles?

A. I have made an examination as to the amount of bi-tartrate of potash contained in each of them. No. 1 I found contained $91\frac{1}{4}$ per cent.; No. 2, $93\frac{1}{4}$ per cent.; No. 3, $95\frac{15}{100}$ per cent.; No. 4, $95\frac{16}{100}$ per cent.; No. 5, $90\frac{50}{100}$ per cent.

Q. You mean by that the percentage of cream of tartar?

A. Bi-tartrate of potash, which is synonimous with cream of tartar.

Q. Can you tell whether sample 5 comes from the red wine or the white wine?

69 A. I should judge that they all came from the white wine.

Q. What else did you find present?

A. I didn't look for anything else. There is always tartrate of lime present. That is a substance dependent altogether upon the soil from which the wine comes. The soil has a great influence. If it is a clayey soil you get more tartrate of lime than you get on any soil; but it is always present as high up as 13 per cent. Thirteen per cent. is the limit which I have been educated to consider as within the limit of non-adulteration.

Q. That would make 87 per cent. of bi tartrate of potash?

A. Yes, sir; I might say that, besides cream of tartar or bi-tartrate of potash in the argol, there are other salts of potash.

Q. What are they?

A. The neutral tartrate of potash in amounts varying from half to 3 per cent.; two equivalents of tartaric acid, and the neutral tartrate is one equivalent; then the tartrate of lime. Those are the three principal salts which enter into the use of argols like these samples.

Q. Is the strength of the tartaric acid in the argols one of the
70 elements of purity or value in the use of the article?

(To this question the plaintiff's counsel objected as immaterial. The court overruled the objection and plaintiff's counsel excepted.)

A. The principal element. It is what it is used for.

Q. That is the principal element?

A. That is the principal element.

Q. Have you made a great many examinations?

A. Yes, sir; of cream of tartar and bi-tartrate of potash. Bi-tartrate of potash is the principal content of cream of tartar which is of value.

Q. That is not the same as tartaric acid?

A. No, sir; it is one of the elements that enter into the salt, bi-tartrate of potash; one is derived from the other.

Q. Tartaric acid is one of the principal elements in the use of the article?

A. It is the principal element.

Q. So that when a witness speaks of a particular sample, as, for instance, the one now shown you, being stronger to the taste of tartaric acid than this sample in the bottle, what is meant as to value?

A. Taking that as a criterion, I should say one was stronger than the other. It is a very loose way of getting at it.

71 Q. Can you tell what this is in the bottle?

A. I can guess what it is. That is cream of tartar. It contains bi-tartrate of potash.

Q. What is this sample? Do you recognize this sample?

A. Yes, sir; that is the same. That is a little the strongest.

Q. Did you give me this sample?

A. No, sir; my samples are in bottles.

Q. What is the pulverization in this?

A. That is cream of tartar. That I know, because I have analyzed it—No. 1028.

Q. What is the percentage of bi-tartrate of potash in that?

A. $94\frac{85}{100}$.

Q. It is less than it is in some of the plaintiff's samples?

A. Yes, sir.

Q. Did you find lime present in that?

A. There is lime in all of them to a greater or less extent. That does not interfere with test in any way whatever. The majority of these goods are used for the baking-powder manufacturer, where they want tartrate of potash.

Q. What should you say, as a practiced man, of testing these articles
simply for the purpose of ascertaining whether or not there is
72 any tartrate of lime in them?

A. It is of no value, because they vary so; in a very crude article you may get a prime crystal.

Q. Neither of these samples are crude argols?

A. No, sir; they have all been partially purified and recrystallized. I am analyzing this class of goods all the time, for the purpose of use in the baking powder manufacture.

Q. To whom are they largely sold?

A. To baking powder manufacturers principally, so far as I am able to judge, who bring them to me to determine the strength of them.

Q. Do they use cream of tartar?

A. Not when they can get these.

Q. Why?

A. They have got more in, and I suppose they are cheaper. I am not thoroughly informed as to the market.

Q. What do you mean by "got more in"?

A. More bitartrate of potash—more than cream of tartar.

Q. What is about the percentage of bitartrate of potash present in refined "argols"?

A. I don't understand the word "argols." I call these cream of
tartar. These contain more bitartrate of potash than the white
73 crystals. In the white crystals the purity is sacrificed, or, in other
words, the strength is sacrificed for the color.

Q. 1075—what is that?

A. A very fine sample of cream. That tests 95.78.

Q. What is the difference between this 1075 and plaintiff's samples?

A. The highest of this range here tests 95.16, 16 from 78; that is ^{62} of a per cent., say $\frac{5}{8}$ of a per cent. That is $\frac{5}{8}$ of a per cent. better.

Q. Better than theirs; which one is it?

A. Number 4.

Q. The white one is $\frac{5}{8}$ per cent. better than the other?

A. No; I should say, in testifying on that point, after making hundreds of analyses of these goods, the result of my investigations leads me to state as a fact that this class of goods contains more cream of tartar than the white—more bitartrate of potash.

Q. Be kind enough to explain the difference.

A. I have tested these goods, testing 99.90 not once, but twice.

Q. Be good enough to explain the difference in color.

A. That is due to the presence of crude tartar.

Q. That is all, is it?

74 A. That is all.

Q. Not due entirely to the presence or absence of lime?

A. That has nothing at all to do with it, because lime salt is a white salt.

Q. It is not due to the presence or absence of tartrate of potash, is it?

A. No, sir; it is due to the organic matter coming from the skin of the grape; and hence in red wines that coloring matter gives a greater color to the article than the white wines.

Q. What are these—sample 4?

A. Those are crude argols from the white wine as they grow on the cask. You can see the mark of the cask on the back of this crust.

Q. Explain the difference between the lees and a crude argol.

A. The lees of the wine I have always understood to be that portion from the press from which the juice has been extracted; and that residue aside and allowed to ferment, and comes into the market in the shape of cakes, very much similar to loose clay. I may be mistaken in giving it that term. I have never connected it with the name of crude argols in any way or shape.

Q. What is that—sample 739?

75 A. That I have called wine lees. They are a peculiar product, and are not often seen in this market. I can give the analysis of these.

Q. Please give it.

A. As far as I am able to learn, and from the experience I have gained in the analysis of these goods, they are wine lees which have been treated with lime or clay; that contains 18 per cent. of bitartrate of potash, and 28 per cent. of tartrate of lime. All the bitartrate of potash has been precipitated out of it as tartrate of lime by the addition of lime, either as tartrate of lime or as carbonate of lime salt.

Q. It is really a manufacture?

A. It is a manufacture. It is a bi-product of a manufacture of wine.

Q. It is not a mere sediment of the barrel, is it?

A. No.

Q. It has been treated first before it is in this form?

A. It can hardly be called a manufacture. It is a product; whether that has any value or is put to any use is another matter. It can be used to manufacture tartaric acid, but it is not generally done in this country.

76 Q. There is no danger of mistaking this lees for crude argol?

A. Not in any sense of the word.

By the court:

Q. Do you call this a manufactured article? (Pl'ff's Sample 1.)

A. I call that cream of tartar.

Q. Would you call that crude tartar?

A. Crude tartar and argols are same thing.

By Mr. TREMAIN:

Q. "Tartar" is a general name?

A. A general name.

Q. "Argols" is a generic name?

A. Yes, sir.

Q. Cream of tartar is tartar, is it not?

A. Cream of tartar is tartar. There are the crude tartars, and then there are the tartrates. These tartrates may be more or less refined. Then there is the cream of tartar.

Q. That is a well known article in commerce?

A. Yes, sir.

Q. And as a marketable commodity, does the thing which passes as cream of tartar differ slightly, or at all, from the plaintiff's samples?

A. When I say cream of tartar, I am speaking as a chemist.

Q. As a practical man, do you know how it is in the trade?

77 A. As a practical man, I say that part of these crystals which floats on the top of the solution in the process of crystallization is called cream of tartar. That is where the name is derived from; that is what it means; now they can call what is at the bottom cream of tartar, which I have seen done, or they can call that from the sides cream of tartar.

Q. The article in commerce which is bought and sold as cream of tartar, is it or is it not usually largely adulterated?

A. Not generally; I have very seldom met with an adulterated sample. It is adulterated here by the manufacturer.

Q. In what state?

A. Generally pulverized, I understand, but I have no practical knowledge on that point.

Q. Is cream of tartar an article that is dealt in in this crystalized form?

A. Yes, sir; it is dealt in as a crystal.

Q. I speak now of the imported cream of tarter?

A. Yes, sir.

Q. You refer to the same thing?

A. I do.

Q. In what respect do the plaintiffs' samples differ from crude argols?

78 A. They have been crystalized, I should say, twice, from their purity. That is, crystallized and recrystallized.

Q. This is the second or recrystallization?

A. I should think so. If there is only one crystallization, it is very well done.

By the court:

Q. If there were but one crystallization, would you call that crude?

A. I call it, because chemically it is cream of tartar.

Q. I understand you to say that the plaintiffs' samples differed from the argol, because they had been subjected to two crystallizations. Then they would be partially refined, would they not?

A. I don't know what you mean by "partially refined." I classify that as cream of tartar chemically. It possesses the crystalline form; it possesses the strength; but the color it does not possess.

By Mr. TREMAIN:

Q. Is it refined?

A. It is refined; the purity shows that.

Q. And refined, you think, by two processes?

A. I think two.

Q. By refinement you mean what?

79 A. Recrystallization, which carried off the impurities; solution, filteration and recrystallization.

Q. Is what is called a crude argol crystallized once, or at all; what do you call a crude argol?

A. Crude argols is the substance which is found in the inside of casks.

Q. Before it has been subjected to any treatment?

A. Before it has been subjected to any treatment whatever. Those are crude argols or crude tartars.

Q. One such process is one step towards refinement?

A. Yes, sir.

Q. Two is two steps?

A. Two is two steps.

Q Will you be good enough to select from the samples before the court an instance where an argol is ground—pulverized?

A. These are pulverized; No. 764 is a white argol, as received from Europe, partly pulverized.

Q. (By the court.) That is the crust?

A. Yes, sir; as it runs in the wine, either broken in transit or partially crushed.

By Mr. **Tremain**:

80 Q. Was it first subjected to some refinement or recrystallization?

A. I should say not. There is no mark whatever on that of ever being in water. It shows the marks of the wood; hence I am of the opinion that it has never been washed.

Q. So—that is what?

A. Crude argols, partially pulverized. There are some red argols—No 761.

Q. Have these been crystallized?

A. These are just as they were received.

Q. These are crude?

A. Those are the crude.

Q. Show me some argol that has been refined, that you have pulverized.

A. There is the powder, 1873.

Q. That is a refined argol which you have pulverized?

A. Yes, sir.

(The crystal and the pulverized samples marked respectively A 1 and A 2.)

Q. That is refined, is it?

A. It tests 94.56 of bitartrate of potash.

Q. Is the powder the same?

A. The same thing.

Q. What did you do, just pulverize it mechanically?

A. I pulverized it in water and then weighed 10 drachms of it as a sample to determine *to* strength.

81 Q. That was commercially an argol, was it—tartar or argol?

A. They have got so many names for them I don't know what you would call them. Some will call them argols and some will call them something else; it depends altogether on circumstances.

Q. As a matter of fact it is a refined argol, isn't it?

A. I don't use the term "refined argols." I call it cream of tartar. It is argol that has been refined; hence you may call it refined argol.

Q. What is this?

A. That is pure bitartrate of potash, chemically pure. I make it 99.99.

(Sample marked K. H., pure.)

Q. What is this—966?

A. 966 is one of these argols that has been refined, and is what I call cream of tartar, and what other people call crude tartar. It has got in it 92.78 of bitartrate of potash.

Q. Is this the powder, pulverized?

A. Pulverized from those crystals.

Cross-examined by Mr. STANLEY:

Q. Did I understand you to say that the name argol and the name tartar mean the same thing?

A. Argol and crude tartar are synonymous.

82 Q. Argol and tartar?

A. Tartar is a generic name signifying those substances containing bitartrate of potash; otherwise those argols are crude tartar.

Q. Don't you understand the word argol to mean the same as tartar?

A. I do not understand that the word argols means crude tartar, not tartar.

Q. Mr. Webster says (in giving his definition of tartar) "when pure it is called cream of tartar, and when crude, argol." Do you find fault with that?

A. Mr. Webster is a very bad authority to cite.

Q. You do find fault with it?

A. I do, decidedly.

Q. Mr. Worcester says that the bitartrate of potassa is an acid substance that concretes on the inside of wine casks, which when crude is called "argol," and when pure "cream of tartar," and gives as his authority Mr. Miller.

A. William Allen Miller?

Q. Yes; was he a very distinguished chemist?

A. He was, in his day.

Q. Do you differ?

A. I do in the use of the word "pure." There never was a pound of cream of tartar sold in this city, as I have means of
83 knowing, that was pure.

Q. Mr. Worcester gives argol as unrefined or crude tartar, a substance adhering to the sides of wine casks, citing Johnson and Cox. They are distinguished authorities among chemists, I believe?

A. I never heard of Cox. There are quite a number of Johnsons.

Q. Why did you call these samples 1, 2, 3, 4, and 5, of our importations, cream of tartar?

A. Because they are used as cream of tartar in the arts.

Q. Has it been your experience to analize these articles for parties who were purchasing them to ascertain what quality they are when they come here?

A. For the importer, for people who are buying, and for the government, who are looking after the interests of both, &c.

Q. Do you or not, as matter of fact, find as much bi-tartrate of potash in the article which is first taken out of the wine butts as in articles that have been, or are said to have been, once washed?

A. I should not say that there was much difference.

84 Redirect:

Q. You don't think a lexicographer is a very good authority upon a chemical subject?

A. No, sir; it is very good for general readers, but we should not be able to make much headway with it in the laboratory.

By the COURT:

Q. You seem to have an acquaintance with this subject of argols, not only chemically, but to a certain extent commercially?

A. Yes, sir.

Q. Do you know what are signified, commercially, by the term "crude argols?" Defendant's counsel suggests that the question should be "Is that a commercial term?"

A. The terms "argol" and "crude tartar" are commercial terms used throughout the world. The term tartar signifies those substances resulting from the refining of crude tartar, containing more or less tartrate of potash.

Q. Now, is there anything that is commercially known as crude argols?

A. These crusts are crude argols; argols or crude tartar, known throughout the commerce of the world; that sample which I have testified to.

85 Q. There is no difference between the commercial and scientific names?

A. No, sir; no difference whatever.

By Mr. **Clarke**:

Q. Is "argols" alone a commercial term?

A. Yes, sir; synonymous with crude tartar.

Q. Do the parties who manufacture baking powders, who buy an article similar to that for that purpose, and bring to you to analize, do they call those articles argols?

A. Some do, and some do not; some say, "I have sent you a sample of cream of tartar over," and some say, "I have sent you a sample of argol over."

By Mr. **Tremain**:

Q. You say that in the original article, on the side of casks, there is as much bi-tartrate of potash in some of it as in some of this refined?

A. I don't say that, but there are some grades of argols which have more bi-tartrate in them.

Q. You mean in their original deposits?

A. There are others which are very bad. If a person goes to work to refine this grade of argols he gets a very good product compared with what it is in the refining of a low grade of argols. Hence it is that all manufactures get as high a strength of bi-tartrate of potash in the
86 crude argol as is possible.

Q. You can take the product of certain grades and you find a very small amount of bi-tartrate, and by additional refinement?

A. It is only a question of refinement on a lower grade.

Q. That depends upon the place where the grape is grown, and the character of the soil?

A. Yes.

Q. Speaking from books and your knowledge as a scientific man, is there a well-known distinction between the grapes that are grown in specific localities and the argols that come from them?

A. Yes; the same as there is a difference between a wheat grown on one soil or on another.

A large number of witnesses were then called by the defendant from the trade and from among manufacturers of cream of tartar and dealers and others, whose testimony tended to prove that there was an article of commerce and of importation which was unlike the plaintiffs' samples, which was in fact "crude argols"; that the plaintiffs' samples exhibited at the trial were not "crude argols"; that said samples differed
87 from "crude argols" in this, that they had been subjected to two or more processes of washing or refinement, by which the yield of bi-tartrate of potash in them was made at a large percentage, to wit, from 90 to 88 per cent., which rendered the argols of the same value for the manufacture of baking powders as cream of tartar, from which

article in a crystallized form it did not differ, although there were various kinds of cream of tartar distinguishable in value and appearance by purity of color. This testimony further tended to show that some argols are of more value and yielded a higher percentage of the bi-tartrate of potash than cream of tartar, and that this was the case with some of plaintiffs' samples. One of the witnesses further testified that the samples shown Professor Doremus pulverized, and stated by him to seem stronger of tartaric acid than the pulverized sample of cream of tartar which Professor Doremus produced, was in fact a pulverization of a small part of plaintiffs' samples which the witness had pulverized since
their first production at the trial. These witnesses also testified
88 uniformly that plaintiffs' samples were refined argols and that
there was a difference between them and "crude argols"; samples of crude argols were exhibited, which samples differed as above stated from those exhibited by the plaintiffs. Also, that there was a difference between "crude argols" and the lees of wine, and that all these differences were well understood by the trade and by manufacturers.

Both parties then rested.

The plaintiffs' counsel then requested the court to direct a verdict for the plaintiffs. The court refused so to do, and plaintiffs' counsel excepted.

The court then charged the jury as follows:

In 1862 Congress imposed a duty of six cents per pound upon argols, or crude tartar. In 1870, among the articles mentioned in the free list, Congress designated "argols, crude, free." In 1871 the plaintiffs made a number of importations of an article which is conceded to have been
argols, upon which the collector of this port exacted a duty at six
89 cents per pound. The plaintiffs protested, appealed to the Secre-
tary of the Treasury, and, the action of the collector having been affirmed by him, brought this suit; and they are now met with two defences; the first of which is that the articles imported were not "argols, crude," and therefore not upon the free list; and the second is that they have been paid a portion of the sum which they were entitled to claim of the government, and upon that payment discontinued two previous suits which had been brought to recover the excess of duty, and it is alleged that that payment constituted an accord and satisfaction of the claim which they had against the government.

Now, all the preliminary steps to entitle the plaintiff to recover have been properly taken in this case, and it then remains to consider, in the first place, whether their importations are those which, as articles included in the free list, should not have been subjected to duty.

Congress, in 1870, seems to have made a distinction between argols generally and argols crude, and I hold, as matter of law, that if you
are satisfied that the importations in question were not argols
90 crude, then the plaintiff is not entitled to a verdict.

Now it appears by the testimony in this case (that of some of the witnesses) that there is a well understood commercial distinction between "argols refined" and "argols crude," and it is stated that this distinction applies to the degree of crystalization which has taken place by the various processes to which argols are subjected. That is to say, if the argols are simply washed in water to cleanse them, that is not a chemical process, and they never have been considered as crude argols, but if after that they are subjected to other processes of boiling in hot water, either one or several processes of that kind, and which upon the

evidence it appears is frequently the case, then they are argols partly refined. Now, this question, upon the evidence here, it seems to me, is a very simple one. Upon the part of the plaintiffs Professor Doremus testified on his direct examination that he thought these argols had been subjected to no process except that of washing them in cold water.
But upon his cross-examination he expresses a different opinion;
91 he thought that they might have been washed with hot water—
boiled once, if I remember rightly, possibly twice. You will remember what the evidence is upon this.

On the other hand, all the witnesses on the part of the defence testify that these argols have been subjected to other processes than that of simply washing them in cold water. The only question for you to determine is whether these argols were argols crude, those known to commerce as such, or those known to science as such, or whether they were argols that were more or less refined. And upon that question I am asked to instruct you that the plaintiff has the burden of proof, and I am asked on behalf of the plaintiff to instruct you that the defendant has the burden of proof. I have concluded to charge you in this case, gentlemen, that while the burden of proof is upon the plaintiff to show by a fair preponderance of evidence that he took all the proper steps to bring his action, it is not upon the plaintiffs in regard to the other question in the case, as to whether the articles in question were argols crude or not. As stated in some decisions, and as is perhaps the general
rule, the burden of proof is upon the defendant to justify his
92 exaction, but whether these observations are deserving of any
great consideration in this case is another question. While the rule as to the burden of proof may furnish a guide to the jury when the evidence is doubtful and difficult, yet in a case where the evidence is clear, although the parties may be entitled to the instructions which they have requested, they are not of that importance which would be the case when the evidence is closely balanced.

Upon the other question, that of payment and settlement of the cause of action in this case, I have intimated during the course of the trial, and I adhere to what I then said, that there is no question in this case to be submitted to the jury as to the settlement of the cause of action which the plaintiffs originally possessed against the defendant. It seems that under this claim they were entitled to a reduction of six cents, or, rather, entitled to bring their suit to recover the amount illegally exacted. They brought suit. The Secretary finally held that they were entitled to a reduction of one half, that is to say, he held that the
article which was imported was only subject to a duty of 3 cents
93 per pound, and thereupon he notified the officers of the custom-
house here to make that reduction, to make that allowance to the plaintiffs; and it seems, according to the actual course of business at the custom-house, the manner of doing business between the custom-house and the Treasury Department, it is usual to obtain a discontinuance of the suit before any such allowance is made by the Secretary of the Treasury to the parties who have claims upon the government of that kind.

The suit was discontinued, and it is claimed here that there is nothing to require the court to leave it to you as a question of fact to say whether or not it was understood between the parties that those three cents upon the pound, amounting to some $17,000, if I remember the amount rightly, which was paid by the government to the plaintiffs and received by the plaintiffs, was so paid and received in settlement of all their claims against the government aris-

ing out of the importations in question. I came to the conclusion that
there was no question to submit to you upon this branch of the
94 case, because it was conceded by the Secretary of the Treasury,
representing the government, that the plaintiffs were entitled to
an allowance of 3 cents per pound, and, therefore, there was no valid
consideration for the agreement, even if one had been made, by which
pl'ffs were to accept a sum to which they were legally entitled in full of
a larger sum claimed them to be due, the case for your consideration.

If the plaintiffs are entitled to recover, they are entitled to recover the amount of $1,138.42 in gold, principal, and $263.70 interest.

As to the various instructions which I have been requested to give the jury, I will decline those asked on both sides, except so far as they have already been charged, and give an exception to each party.

The plaintiffs' counsel then duly excepted to so much of the charge as stated to the jury, that Congress in 1870 seems to have made a distinction between argols generally and argols crude.

The plaintiffs' counsel also excepted to so much of the charge as left
a question of fact to the jury whether, under the evidence, the impor-
tations in question were or were not argols crude.
95 The plaintiffs' counsel then requested the court to charge the
jury—

First. That it has been proved in this case that the defendant exacted a duty of six cents a pound upon the argols in question; and that the burden of proof is upon the defendant to justify such exaction.

The court refused to charge otherwise than as it had charged, and plaintiffs' counsel duly excepted.

Second. That if the jury believe that the argols in question were crude and not refined, the plaintiffs are entitled to recover; that the degree of crudeness is immaterial if the jury find that they were crude argols.

The court refused to charge otherwise than as it had charged, and plaintiffs' counsel excepted.

Third. That if the jury believe that the articles in question were
commercially known in 1870 among importers and their customers as
argols or crude tartars, the plaintiffs' are entitled to recover.
96 The court refused to charge the jury otherwise than as it had
charged, and plaintiffs' counsel excepted.

Fourth. The plaintiffs' counsel then requested the court to charge that if the jury believe that articles like these imported by pl'ffs were in 1870, and at any time subsequent thereto, generally bought and sold in this country by the sample name of argols, and by no other name, plaintiffs were entitled to recover.

The court refused to charge otherwise than as it had charged, and plaintiffs' counsel excepted.

Fifth. That if there was no article generally known in the trade and commerce of this country, in 1870, as crude argols, to distinguish it from argols of different degrees of crudeness, and if the goods imported by plaintiff were generally bought and sold under the sole name of argols, plaintiffs are entitled to recover.

The court refused to charge otherwise than as it had charged, and plaintiffs' counsel excepted.

Sixth. That crude argols—no matter as to the degree of crudeness—
were entitled to free entry.
97 The court refused to charge otherwise than as it had charged,
and plaintiffs' counsel excepted.

The jury having retired, afterwards returned into court and returned a verdict for defendant.

And inasmuch as the matters aforesaid do not appear upon the record, the plaintiffs' counsel here caused this bill of exceptions to be made, and the same was duly settled on the 28 day of April, 1875.

WM. J. WALLACE,
U. S. Dist. Judge.

(Endorsed:) U. S. circuit court, so. dist. of New York. Carl L. Recknagel et al., plaintiffs, against Thomas Murphy, defendant. Bill of exceptions. Stanley, Brown & Clarke, attorneys for, 16 Wall street, New York. 2172. No. 9, p. 71. Filed Oct. 13, 1876.

98 *Assignment of errors.*

Supreme Court of the United States. Of October term, in the year of our Lord one thousand eight hundred and seventy-seven.

CARL L. RECKNAGEL, ALBRECHT PAGENSTECHER, and Rudolph Pagenstecher, pl'ffs in error,
vs.
THOMAS MURPHY, DEF'T IN ERROR.

Afterwards, to wit, on the second Monday of October, in said term, before the justices of the Supreme Court of the United States, at the Capitol, in the city of Washington, comes the said Carl L. Recknagel, Albrect Pagenstecher and Rudolph Pagenstecher, by Stanley, Brown & Clarke, their attorneys, and say that by the record aforesaid there is error in the several rulings of the court, upon the rejection or admission of testimony, to which exception has been taken; also that there was error in the refusal of the court to direct a verdict for the plaintiffs in error as ther'to requested, and in the refusal of the court to
99 charge the jury as therein requested; whereas, by law of the
land, the said judgment ought to have been given for the said plaintiffs in error against the said defendant in error; and the said plaintiffs pray that the judgment aforesaid, for the errors aforesaid, and other errors in the record and proceedings aforesaid, as the same appear more fully therein, may be reversed, annulled, and altogether held for nothing, and that the plaintiffs may be restored to those things which they have lost by reason of said judgment.

STANLEY, BROWN & CLARKE,
Att'ys for Pl'ffs in Error.

(Endorsed:) U. S. Supreme C't. Carl L. Recknagel et al., pl'ffs in error, vs. Thomas Murphy, def't in error. Assignment in error. Stanley, Brown & Clarke, att'ys for pl'ffs in error, 195 Broadway. U. S. circuit court. Filed Oct. 2, 1877. John I. Davenport, clerk.

100 *Joinder in error.*

Supreme Court of the United States.

CARL L. RECKNAGEL, ALBRECHT PAGENSTECHER, and Rudolph Pagenstecher, plaintiffs in error,
vs.
THOMAS MURPHY, DEFENDANT IN ERROR.

And afterwards, to wit, on the second Monday of October, in October term, in the year one thousand eight hundred and seventy-seven, the said Thomas Murphy, by Stewart L. Woodford, his attorney, freely comes here into court and says that there is no error either in the record or proceedings aforesaid or in the giving of the judgment aforesaid; and he prays that the said Supreme Court of judication, before the justices thereof now here, may proceed to examine as well the record and proceedings aforesaid as the matters aforesaid above assigned for error, and that the judgment aforesaid, in form aforesaid given, be in all things affirmed, &c.

STEWART L. WOODFORD,
Att'y for Defendant in Error.

101 (Endorsed:) U. S. Supreme Court, southern. Carl L. Recknagel & al., pl'ffs in error, vs. Thomas Murphy, def't in error. Joinder in error. Stewart L. Woodford, United States attorney.

Due service of a copy of the within is hereby admitted.
N. Y., Oct. 3d, 1877.

STANLEY, BROWN & CLARKE,
Pl'ffs' Attorneys.

Filed Oct. 3, 1877.

JOHN I. DAVENPORT,
Clerk U. S. Circuit Court.

102 *Bond for costs.*

Circuit court of the United States of America for the southern district of New York, in the second circuit.

CARL L. RECKNAGEL, ALBRECHT PAGENSTECHER, and Rudolph Pagenstecher, plaintiffs,
vs.
THOMAS MURPHY, DEFENDANT.

Know all men by these presents that we, Rudolph Pagenstecher, residing at No. 52 West 40 street, in the city of New York, and Louis Kloeckner, residing at No. 16 Livingston Place, in the city of New York, are held and firmly bound unto the above named Thomas Murphy in the sum of two hundred and fifty dollars, to be paid to the said Thomas Murphy, for the payment of which, well and truly to be made, we bind ourselves, and each of us, our and each of our heirs, executors, and administrators, jointly and severally, firmly by these presents, sealed with our seals and dated the day of , in the year of our Lord one thousand eight hundred and .

Whereas the aboved named plaintiffs have prosecuted a writ of error to the Supreme Court of the United States, to reverse the judgment rendered in the above entitled suit by the circuit court of the United States for the southern district of New York:

Now, therefore, the condition of this obligation is such, that if the above named plaintiffs shall prosecute their said writ of error to effect and answer all damages and costs if they shall fail to make their plea good, then this obligation shall be void otherwise the same shall be and remain in full force and virtue.

RUDOLPH PAGENSTECHER. [L. S.]
LOUIS KLOECKNER. [L. S.]

Sealed and delivered and taken and acknowledged this 16 day of May, 1877, before me.

MELVIN BROWN,
Notary Public, N. Y. City & Co.

103 UNITED STATES OF AMERICA,
Southern District of New York, ss:

Rudolph Pagenstecher and Louis Kloeckner, respectively, being duly sworn, doth depose and say that he is worth the sum of five hundred dollars over and above all his just debts and liabilities.

RUDOLPH PAGENSTECHER.
LOUIS KLOECKNER.

Sworn to this 16 day of May, A. D. 1877, before me.

MELVIN BROWN,
Notary Public.

(Indorsed:) Vol. , page . U. S. circuit court. Carl L. Recknagel et al. vs. Thomas Murphy. Bond for costs on writ of error. Stanley, Brown & Clarke, att'ys for pl'ffs. Approved. Alex. S. Johnson, circuit judge. Filed this 16 day of May, 1877.

104 THE UNITED STATES OF AMERICA, *ss:*

To Thomas Murphy, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October, eighteen hundred and seventy-seven, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the southern district of New York, wherein Carl L. Recknagel, Albrecht Pagenstecher, and Rudolph Pagenstecher are plaintiffs in error, and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the honorable Alexander S. Johnson, judge of the circuit court of the United States for the southern district of New York, this 16 day of May, in the year of our Lord one thousand eight hundred and seventy-seven.

ALEX. S. JOHNSON,
Circuit Judge.

STANLEY, BROWN & CLARKE,
Att'ys for Pl'ffs in Error.

105 (Indorsed:) 2172. U. S. Supreme Court. Carl L. Recknagel et al., plaintiffs in error, against Thomas Murphy, E. & O. D. No. 3, p. 28, defendant in error. Citation. Stanley, Brown & Clarke, pl'ffs' att'ys, 195 B'way.

Service of a copy of the within is hereby admitted.
N. Y., May 16, 1877.

STEWART L. WOODFORD,
Def't's Att'y.

Filed May 16, 1877.

JOHN I. DAVENPORT,
Clerk U. S. Circuit Court.

(Indorsement on cover:) No. 314. Carl L. Recknagel, Albrecht Pagenstecher, and Rudolph Pagenstecher, pl'ffs in error, vs. Thomas Murphy, late collector of the port of New York. S. New York, C. C. U. S. Filed 17th October, 1877.

EVEN NG POST PRINT, 208 B'way N. Y.

OFFICE SUPREME COURT U.S.
FILED
OCT 18 1880
JAMES H. McKENNEY, Clerk.

U. S. Supreme Court.

OCTOBER TERM, 1880.

CARL L. RECKNAGEL ET AL.,
Plaintiffs in error,

vs.

THOMAS MURPHY, COLLECTOR,
Defendant in error.

No. 56.

Error to U. S. Circuit Court, Southern District of New York.

PLAINTIFFS' BRIEF.

Statement.

The plaintiffs proved importations of argols into the port of New York, in the year 1871, upon which the defendant levied a duty of six cents per pound.

The protest claimed that the Act of July, 14, 1862, section 5, which imposed a duty of six cents per pound on argols or crude tartar, was repealed by the Act of July 14, 1870, sec. 22 (Record, page 12).

The plaintiff's bill of particulars embraced several items upon which they claimed suit had been instituted in time by reason of the following letter offered by them in evidence:

TREASURY DEPARTMENT,
WASHINGTON, D. C., October 1, 1872.

Collector of Customs, New York:

Sir,—I am in receipt of your letter of the 27th instant, reporting further in regard to the appeal (5,850) of R. D. Jackson from your assessment of duty at the rate of six cents per pound on certain brown argols, imported by him as therein set forth.

Upon further consideration of Department's decision of January 28, 1871, under which these duties were charged, the Department is satisfied that the position therein taken would not be sustained by the courts, inasmuch, as it would seem to be clear that the provision in the Act of July 14, 1862, imposing six cents per pound duty on argols or crude tartar is wholly repealed by the Act of July 14, 1870.

The provision in the Act of August 5, 1861, by which all argols were charged with three cents per pound duty is, however, regarded by the Department as still in force as far as partially refined argols are concerned; and you will, therefore, hereafter assess that rate of duty on this class of merchandise. You will also take necessary steps to refund the excess of duty beyond the rate on prior importations, where the provisions of the 14th section of the Act of June 30, 1864, have been fully complied with.

I am, very respectfully,
WM. A. RICHARDSON,
Acting Secretary.

This letter upon defendant's objection the court excluded, and plaintiff duly excepted. The substantial question upon the merits is, whether the Act of 1862 was or was not repealed by the Act of 1870.

These statutes are as follows:

Act of of July 14, 1862, section 5: "Argols, or crude tartar, six cents per pound; cream tartar, ten cents per pound." 12 U. S. Stat., 547.

Act of July 14, 1870, sec. 22: In list of articles to be thenceforth free of duty we find "argols, crude." 16 U. S. Stat. 266.

The Act of August 5, 1861, in the first section, imposed duty "on argol, three cents per pound; cream tartar, six cents per pound." 12 U. S. Stat., 292.

Argol is a by-product of the manufacture of wine, and is not produced to any extent in this country.

When wine ferments, certain crystal deposits cling to the sides or fall to the bottom of the casks. The chemical name for this article is the bitartrate of potash, a salt formed by the union of tartaric acid with potassa. Mixed with this deposit are impurities that gather in the wine, such as leaves, sticks, and dirt. By washing, the dirt, leaves, sticks and other impurities on the surface are removed.

By dissolving these deposits in water, and evaporating the solution to a point where crystalization takes place, other impurities may be eliminated. By repeated solutions and evaporations the crystals may be brought to a great degree of freedom from impurities, and they are then known in trade and commerce as "cream of tartar."

Up to the point at which the article becomes known commercially as "cream of tartar," it is known commercially only as "argol or crude tartar." The crystal cream of tartar is ground into a powder for various uses. It is known as cream of tartar while in the crystal as well as while in the powder.

Argol and cream of tartar are only or chiefly valuable for the tartaric acid contained in them.

The chemical constituents of argols remain unchanged by washing and recrystalization.

Tartaric acid is extracted from cream of tartar by a chemical process which removes the potash.

The three articles known commercially as *Tartaric acid*, *Cream of Tartar*, and *Argols*, are all used for some of the same purposes, to wit, for making baking powders, for mordants for dyeing, and for making certain medicines.

Great differences in the color, strength and purity of argols arise from natural impurities and from peculiarities of the soil and climate where grapes are grown; thus a white wine gives a naturally white argol, and a red wine a naturally red argol, but by washing it becomes white.

Some argols are of such greater natural strength in tartaric acid as to make them worth more in the market than cream of tartar, in which strength is sacrificed to whiteness, and no two lots of argols are alike.

As to the particular goods in controversy, as stated in the charge of the court (Record, fol. 89), they were "an article which is conceded to have been argols, upon which the Collector of this port exacted a duty at six cents per pound."

They were sold as "argols and by sample, and not by any other name or in any other way" (Record, fols. 64 and 65.)

They had been, in fact, in the language of a chemist testifying for the defendant (Record, page 28, folio 72), "partially purified and re-crystalized," hence *he* did not consider them crude.

He called them, in a chemical sense, "cream of tartar," but *not in a commercial* sense (Record, fols. 76, 77 and 78), and testified (Record, bottom of page 31). "A. 966 is one of these argols that has been refined and is what *I* call cream of tartar, and what *other people* call crude tartar."

Dr. Doremus testified as follows: "Q. Is there any difference between crude argols and crude tartar? A. No difference; crude argols, argols, crude tartar; they are commonly known under those three terms." (fol. 36.)

ERRORS ASSIGNED.

The charge of the court (folio 90; exceptions, folio 94 of Record), "Congress, in 1870, seems to have made a distinction between argols generally and argols crude, and I hold as matter of law, that if you are satisfied that the importations in question were not argols crude, then the plaintiffs are not entitled to recover."

Folio 91: "The only question for you to determine is, whether these argols were crude, those known to commerce as such, or those known to science as such, or whether they were argols more or less refined."

And the refusals to charge as requested by plaintiffs' counsel (folio 95, and exceptions).

Second.—"That if the jury believe that the argols in question were crude and not refined, the plaintiffs are entitled to recover; that the degree of crudeness is immaterial if the jury find that they were crude argols."

Third.—"That if the jury believe that the articles in question were commercially known in 1870 among importers and their customers, as argols or crude tartars, the plaintiffs are entitled to recover."

Fourth.—"That if the jury believe that articles like these imported by plaintiffs were, in 1870, and at any time subsequent thereto, generally bought and sold in this country by the simple name of argols, and by no other name, plaintiffs were entitled to recover."

Fifth.—"That if there was no article generally known in the trade and commerce of this country in 1870, as crude argols, to distinguish it from argols of different degrees of crudeness, and if the goods imported by plaintiffs were generally bought and sold under the sole name of argols, plaintiffs are entitled to recover."

Sixth.—"That crude argols, no matter as to the degree of crudeness, are entitled to free entry."

The refusal of the court to direct a verdict for the plaintiffs.
Record, folio 88.

The exclusion of the letter before quoted.
Record, folios 31, 32.

ARGUMENT.

By the statute of 1870 all argols were exempted from duty, except the articles commercially known as "cream of tartar" and "tartaric acid."

As it was conclusively established, and without contradiction, that "*argols*" and "*crude tartar*" are synonyms, the words "argols crude," in the Act of 1870, mean, of course, the same as "crude tartar crude," but "crude tartar crude" means nothing more than "crude tartar," because "crude tartar" is always crude until it is refined to the point of cream of tartar; so "argols crude" means nothing more than "argols," because argols are in fact, and in the trade and in chemistry, always more or less crude until refined into cream of tartar, and then they cease to be argols, properly speaking, and in the sense in which that term is used in the revenue acts, although some call "cream of tartar" "refined argols" (fols. 58, 71, 75, 76, 77, 78, 81). The sole object of the Act of 1870 in the use of the word "crude," was to leave no room for claim that "refined argols" or "cream of tartar" was to be free. No one testified that any form of tartar was known in commerce as "refined argols" until after it had been refined into "cream of tartar."

Our contention in short is, that the Act of 1870 made free all argols which were not cream of tartar. The word argols being used in the statutes as it is in business and scientifically as a synonym for crude tartar.

The following schedule shows the manner in which Congress has used the various terms argol, crude tartar and cream of tartar :

Date of Act.	Vol.	Page.	Section.	Sched.	
July 14, 1832..	4	590	3	Free.	"Argol," "Tartar Crude," enumeration also of "Tartaric Acid."
Sept. 11, 1841..	5	463	1	Free.	"Argol," "Cream of Tartar," "Crude Tartar," enumeration also of "Tartaric Acid.'
Aug. 30, 1842..	5	559	8 ¶ § 4	20%	"Tartaric Acid."
" " ..	5	561	9 ¶ § 7	Free.	"Argol," "Cream of Tartar," "Tartar when crude."
July 3, 1846...	9	46		E 20%	"Tartaric Acid."
" "	9	47		E 20%	"Cream of Tartar."
" "	9	48		H 5%	"ARGOL OR CRUDE TARTAR."
Mar. 3, 1857....	11	193	1	I Free.	"Argol or Crude Tartar."
" "	11	193	2	H 4%	"Tartaric Acid," "Cream of "Tartar," transferred to Sched. H.
Mar. 2, 1861...	12	189	20	20%	"Tartaric Acid."
" " ...	12	193	23	Free.	"Argol, or Crude Tartar."
" " ...	12	194	23	Free.	"Cream of Tartar."
Aug. 5, 1861...	12	292	1		"On Argol, three cents per pound ; on Cream of Tartar six cents per pound ; on Tartaric Acid, Tartar Emetic and Rochelle Salts, ten cents per pound."
July 14, 1862..	12	547	5		"Acid, Tartaric, twenty cents per pound." "Argols, or Crude Tartar, six cents per pound ; Cream of Tartar, ten cents per pound."
July 14, 1870..	16	266	22	Free.	"Argols, Crude."

The draftsman of the Act of 1870, using indifferently the synonym "argol" for "tartar," qualified it by the word "crude" in the same sense as he would have qualified the other synonym "tartar," had he used that word, meaning in either case to describe the same goods, and omitting one of the two synonyms for the sake of brevity.

The legislation *in pari materia* with which the Act of 1870 must be construed is significant.

The first mention of the foregoing articles is found in the Tariff Act of July 14, 1832 (4 Stats., 590), where are exempted from duty "argol," "tartar crude," and mention is also made of "tartaric acid." By the Tariff Act of September 11, 1841, (5th Stats., 463) "argol," "cream of tarter" and "crude tartar" are exempted from duty, and "tartaric acid" is also mentioned; which latter, by the Tariff Act of August 30, 1842 (5 Stats. 559) is made dutiable at 20 per cent., while *ibid.* p, 561, "argol," "cream of tartar" and "tartar when crude" are, by the same act, continued free of duty.

Thus far it will be noticed that Congress used both terms, "argol" and "tartar when crude," but, if two articles, it every time exempted both from duty in the same section of the statute.

Coming now to the Tariff Act of 1846 (9th Stats., 46, Sched, E), we find dutiable at 20 per cent., "tartaric acid" and p. 47. "cream of tartar," while on p. 48, sched. H., dutiable at 5 per cent. is found "*argol or crude tartar.*"

The use of several convertible synonymous terms to designate the same thing is of frequent occurrence in tariff legislation. Thus in title XXXIII. of the Revised Statutes, Ed. of 1878, we find:

Sail duck or canvas for sails Sched. C, p. 463.
Argentine albatta or German silver, Sched. E, p, 467.
Indian corn or maize, preserved or condensed milk, Sched. F, p. 468.

Bay rum or bay water,	Sched.	M, p.	473.
Slack coal or culm,	"	"	474.
Fusil oil or amylic alcohol,	"	"	476.
Gum substitute or burnt starch,	"	"	476.
Linseed or flaxseed,	"	"	477.
Vitriol white or sulphate of zinc,	"	"	482.

Balsam fir or Canada,	Free list, p.	483.
Cocoa or cacao,	"	484.
Conium cicuta or hemlock,	"	484.
Diamond dust or bort,	"	485.
Esparto or Spanish grass	"	485.
Istle or Tampico fibre,	"	486.
Plaster of Paris or sulphate of lime,	"	487.
Squills or silla,	"	488.

Many more might be gathered from earlier acts.

In 1855 the question arose in the Massachusetts District whether or not, under the tariff Act of 1846, "argol or crude tartar" truly enumerated goods like the plaintiffs here, which were not in a naturally crude state and had undergone a process of refining, but were not known in commerce as "cream of tartar," and were claimed by the importer to be dutiable *eo nomine* as "argol or crude tartar," and were charged by the collector as not so enumerated, but dutiable as "cream of tartar" by similitude.

Ross *v.* Peaslee, 2 Curtis, CC. 499, 500.

The first paragraph of Judge Curtis's charge sets forth the same difficulties as are disclosed by the present record in making fine or certain distinctions in an article so intricate and protean in its forms as argol.

The charge then proceeds upon the defense of similitude set up by the defendant, and upon p. 502 the report closes. "The jury found that the import in question was liable to pay a duty of five per cent. only."

This decision was acquiesced in by all parties, and, with it in view, Congress, two years afterwards, passed the tariff Act of 1857 (11th Stats., 193), wherein "argol or crude tartar" was made free of duty, and "tartaric acid" and "cream of tartar" were transferred to Schedule H, at 4%.

While it is possible that the jury in Ross *v.* Peaslee may have found the goods not in fact "argol or crude tartar," but dutiable, as such, by similitude, yet Congress, in the legislation of 1857, only two years later, having the facts and this verdict in view, legislating anew on the subject, and with full opportunity for correction if correction was necessary or intended, made no change in its enumerations.

In harmony with this view are the Treasury Regulations of 1857, page 554:

> "Argols or crude tartar—tartar, unless refined, so as to con-
> "stitute the article known in commerce as 'cream of tartar,'
> "provided for in Schedule E of the tariff Act of 1846, will be
> "considered and treated as 'crude tartar,' and be subject to a
> "duty of five per cent., under Schedule H of that act."

Four years later, by the tariff Act of March 2, 1861 (12 Stats., 189), the same classification again appears: "Tartaric acid" 20%; p. 193 free "argol or crude tartar," p. 194, "cream of tartar."

A war duty was imposed by the tariff Act of August 5, 1861 (12th Stats., 292) "on argol," three cents per pound (no mention is made here of crude tartar); "cream of tartar," six cents per pound; "tartaric acid," ten cents per pound. Under this statute all argols not cream of tartar were assessed at three cents per pound.

These war duties were doubled the next year by tariff Act of July 14, 1862 (12th Stats., 547), viz., on "argols or crude tartar," six cents per pound; "cream of tartar," ten cents per pound; "tartaric acid," twenty cents per pound.

It is manifest from this act that "argols or crude tartar" was the synonym for "argol" in the former act.

No further legislation took place until 1870.

Thus for a period of twenty-four years the legislation shows uniform treatment of this question, and covers the entire subject matter under the provisions for "tartaric acid," "cream of tartar," and "argols, or crude tartar."

"When Congress, in legislating on the subject of duties,
"has described an article so as to identify it by a given desig-
"nation, for revenue purposes, and this has been so long con-
"tinued as to impress on it a particular designation as an arti-
"cle of import, then it must be treated as a distinct article,
"whether there be evidence that it is so known in commerce
"or not.

"It must be taken as thus known in the sense of the rev-
"enue laws, by reason of the legal designation given to it, and

"by which it has been known and practised on at the Custom House."

Judge Nelson in DeForrest vs. *Lawrence,* 13 *How.* 282.

See also United States *vs.* Tappan, 11 Wheat., 419, 422.

The Act of 1870 exempted from duty "argols crude."

"It is not to be presumed that Congress, when it substitutes the provisions of one tariff act for those of another, intends to use terms in a sense different from that in which they were used in the prior act."

Roosevelt *vs.* Maxwell, 3 Blatch., 391.

The true question here is not whether it is possible to find a theoretical abstract meaning for "argols crude," substantially differing from "argols, or crude tartar," and, if so, to adopt it, regardless of the former law, and the new and practical inconveniences and confusion into which an important branch of business, conducted under uniform legislation for a quarter of a century, is to be thrown, but whether or not such possible new meaning, if it can be found, was the true intendment of the law-makers in the language employed.

The intention of the statute may be gathered from the general use of the word "crude" in the same section exempting argols from duty.

This general use, *vide* (§ 22, Act July 14, 1870, 16 Stats., 266), is in a relative, and not in a literal sense, as appears by the following examples, viz.:

"Arsenious acid, crude;" "aniline oil, crude;" "*ammonia*, crude;" "argols, crude;" "brimstone, crude;" "iodine, crude," &c. The relation here being to the refined articles. Now, the refined article of argols is commercially "cream of tartar," dutiable *eo nomine*, as such, and as plaintiffs' article was *concededly not cream of tartar*, it must have been in tariff contemplation *crude tartar*, notwithstanding some purification had taken place; a partial and uncertain degree of which being regarded as immaterial for tariff purposes so long as the article was argol and not cream of tartar, and the facts as to the numerous varieties and conditions of argol having been as long known as the decision in Ross *vs.* Peaslee, *supra*, in 1855, and the Treasury decision of 1857.

Had a more particular distinction been intended it would have been made clear as upon other articles in the same section of this act, *e. g.:*

> "Fur skins *not dressed in any manner.*"
> "Glass, *broken in pieces, which cannot be cut for use and fit* "*only to be remanufactured.*"
> "Horse and cow hair, *not cleaned and dressed.*"

and in place of "argols crude" would have been inserted "argols or crude tartar *not washed or purified in any manner.*"

The intention of the statute is further shown by the purpose of Congress in its passage, July 14, 1870.

It appears by the record that argols are the *by-product* of wine not produced to any extent in this country. Here we have no argol industry to protect. Argols were free of all duty from 1832 to 1846, when until 1857 they paid but five per cent. duty, and then up to August 5, 1861, were free again.

The war duties of three cents per pound, increased to six cents per pound July 14, 1862, continued without abatement until July 14, 1870. This was a direct and onerous burden upon our domestic woolen manufacturers, calico printers, dyers and others using them as the raw materials of their products. It was a tax, too, upon every loaf of bread raised with baking powders, and it protected no one. The policy of the act of July 14, 1870, was to diminish the surplus revenues and the burdensome war duties, especially those imposed on such foreign articles not produced here as entered into our home industries as raw materials, *vide* § 22 of the act.

Hence it is to be inferred that practical relief was intended by the voluntary abandonment of the former war duty of six cents per pound on "argols or crude tartar," and the construction of the act is to be made in that view, for the opposite construction gives no practical reduction and nullifies that intention. If there be doubt as to to the extent of reduction the policy of the act resolves the doubt in favor of the extent defined by former laws, viz., all below cream of tartar.

It was immaterial that plaintiff's goods were used by some people for similar uses to those of "cream of tartar," or bore greater or less resemblances to that article in the opinion of some witnesses, or had undergone one or more washings or recrystalizations. They were not commercially known as "cream of tartar," and were conceded to have been "argols."

In view of the fact that "cream of tartar" is a well-known commercial term, the chemical testimony as to whether or not the goods were in a chemical sense "cream of tartar" was immaterial.

United States *vs.* 200 chests of tea, 9 Wheat., 430.

The Collector, in his original assessment of duty, decided them not to be cream of tartar, and levied the argol duty upon them under a statute, which, as we have argued, had been repealed.

The different varieties of argol so run together that until the fixed point of commercial cream of tartar is reached, it is impracticable to make with reasonable certainty fair distinctions between them. It can only be done by chemical analysis as to their strength, which is not the standard for duty.

Congress has put them in a dutiable category by their commercial name.

But the only commercial designation is argol or crude tartar, and crude is not applied as a commercial term to argol.

Looking at it in the sense of the law and of the facts, it is manifest that crude argols were the goods not refined to the extent of being the commercial cream of tartar.

The entire case of the defendant rests upon partial refinement; but if the Act of 1870 repeals the prior act, using argol crude as the synonym of "argol or crude tartar" of the earlier act, there is no ground for the distinction. If not cream of tartar, the degree of crudeness is immaterial.

If these views are correct, the judge's charge in the particulars pointed out was erroneous; and the plaintiffs, there being no question as to the commercial designation of their importation, were entitled, as matter of law, to have a verdict directed in their favor.

II.

The court erred in refusing to admit the letter of the secretary offered in evidence (Record, page 13). The plaintiffs had protested and appealed, and this letter, by that fact, was made a decision of the secretary upon all such appeals. By its terms it not only answered a particular appeal, but was made applicable to all other entries upon which protest and appeal had been made in due time.

Stephen G. Clarke,
Of Counsel for Plaintiffs.

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STEPHEN G. CLARKE,
Of Counsel for Plaintiffs.

OFFICE SUPREME COURT U.S.
FILED
JUL 14 1880
JAMES H. McKENNEY, Clerk.

In the Supreme Court of the United States

OCTOBER TERM, 1880.

CARL L. RECKNAGEL ET AL.
v.
THOMAS MURPHY.
No. 56.

ERROR TO UNITED STATES CIRCUIT COURT, SOUTHERN DISTRICT OF NEW YORK.

DEFENDANT'S BRIEF.

In the Supreme Court of the United States.

OCTOBER TERM, 1880.

CARL L. RECKNAGEL ET AL.
v. } No. 56.
THOMAS MURPHY.

ERROR TO UNITED STATES CIRCUIT COURT, SOUTHERN DISTRICT OF NEW YORK.

DEFENDANT'S BRIEF.

STATEMENT.

This action is brought to recover a sum exacted of the plaintiffs by the defendant, then collector, as duties upon a quantity of argols by them imported, in November, 1871, into New York, and which they claim were entitled to free entry.

In the fermentation of wine a deposition occurs, commonly called argols, compounded of tartaric acid, potash, iron, and coloring matter. From this precipitate or deposit, the bitartrate of potash or cream of tartar is prepared by prolonged and repeated boiling, the addition of alumina, and pulverization. (Record, 14, 15.)

The first time I find "argol" specifically mentioned in our statutes is where the article thus designated is placed upon the free list, after March 3, 1833, by act approved July 14, 1832, § 3. (4 Stats., 590.) This list also enumerates "tartar crude." (*Ib.*)

That exemption is continued by the act of September 11, 1841, c. 24, which names also "crude tartar." (5 Stats., 463, near middle, and 464, top.)

The act of August 30, 1842, c. 270, § 9, keeps upon the free list "argol, cream of tartar," and "tartar when crude." (*Id.*, 561, item "Seventh.")

The act of July 30, 1846, c. 74, which bore the title "An act reducing the duty on imports, and for other purposes," placed an ad valorem duty of twenty per cent. on cream of tartar, and five per cent. on argol or crude tartar. (9 Stats., 47, lines 7 and 48, Schedule H, first line.)

By the act of March 3, 1857, c. 98, the duty on cream of tartar was reduced to five per cent. ad valorem, and argol or crude tartar was admitted free. (11 Stats., 193.)

The expenses of the war led to the imposition of duty upon articles previously exempt; and, by act of August 5, 1861, c. 45, there was imposed "on argol, three cents per pound; on cream tartar, six cents per pound." (12 Stats., 292.) Crude tartar is not mentioned.

When, under the exigencies of the times, duties were increased, by the act of July 14, 1862, c. 163, there was placed upon "argols, or crude tartar, six cents per pound; cream tartar, ten cents per pound." (12 Stats., 547, § 5.)

It was under this enactment that the exaction now complained of was made. The importers, in their protest (Record, 12; folio 30), claimed that this statutory provision was repealed by the act of July 14, 1870, c. 255, § 22, which permitted the free entry, among other things of "argols, *crude*," after December 31, 1870. (16 Stats., 266.)

The collector held that these argols were not "crude," and therefore levied a duty of six cents a pound upon them, under the act of July 14, 1862, § 5.

BRIEF.

I.

The act of July 14, 1862, § 5, imposed the duty here demanded upon *all* "argols, or crude tartar." (12 Stats., 547.)

The act of August 5, 1870, relieves from duty only those argols which are "*crude.*" (16 Stats., 266.)

Whether or not these particular importations were crude was a question of fact. As such, it was properly submitted to the jury, who found that they were *not* crude, thus sustaining the action and judgment of the collector. (Record, 34.)

By reference to the earlier statutes cited, it will be seen that argols and crude tartar were there mentioned in separate lines, as different articles. They both appear in the act of September 11, 1841, but the enumeration being alphabetical, "argol" is found near the middle of one page (5 Stats., 463), and "crude tartar" in the fourth line of the next page (*Id.*, 464), with a multitude of articles between, among them "cream of tartar," which concludes those having names beginning with the third letter of the alphabet. The same arrangement is preserved in the act of August 30, 1842, but the phraseology is so changed as to substitute for "crude tartar" the words "tartar, *when crude.*" (5 Stats., 561.)

This collocation indicates the existence of a real or supposed distinction between "argols" and "crude tartar," as recognized at that time. That is to say, the original deposit of the wine was known as "argols," and those partially (slightly or greatly) advanced in purification as "crude tartar." The testimony in this case tends to show, however, that the rough argols are now commercially known synonymously with crude tartar.

To restore the former distinction, apparently, Congress has expressly distinguished between argols crude and those other than crude. All argols are crude tartar; but they are not all crude argols. Crude argols are the original deposit. Some of the impurities or crudities may be removed, by boiling or otherwise, so that they are no longer crude as argols, even though they may remain in the crude state of tartar. The testimony leaves it doubtful, however, whether these were crude as tartar.

The adjective "crude" has no peculiar technical meaning, as used in these statutes, any more than the words "wearing apparel" (16 Howard, 261) or "goods of a similar description," occurring in the case of Greenleaf *v.* Goodrich, No. 127, upon last term's docket.

Ever since the early, obviously just, decision of this court that the duty to which an importation is subject is to be determined by ascertaining the articles commercially known under the names used in the statute, the passage of an amended tariff is a signal for the creation of a new system of commercial nomenclature, devised to evade its provisions. The effort is not confined to substantives designating particular articles, but is extended to the most common, untechnical adjectives and phrases.

The general meaning of "crude," as given by Webster, is: "1. In its natural state; *not cooked or prepared by fire or heat;* undressed; not altered, refined, or prepared for use by *any* artificial process; raw." To illustrate this definition, he quotes Isaac Taylor: "Molding to its will each successive deposit of the crude materials." This line of Milton is also quoted:

> The originals of nature in their crude conception.

But the word is of too common use to require resort to dictionaries.

If the term "crude argols" has a commercial meaning, it does not embrace the plaintiffs' importations, as is fully shown by the testimony hereinafter mentioned. (Record, 33, 34.)

Reference to the context of the statutes in force in 1871, as well as to those *in pari materia* of earlier and later date, shows the word "crude" to have its ordinary meaning in this connection. The position of the words, the adjective following the substantive, also indicates it.

The act of September 11, 1841, c. 24, puts upon the free list, *inter alia*, the "tools of trade of persons arriving in the United States, crude antimony, regulus of antimony, animals imported for breed, argol," &c. (5 Stats., 463.)

Now, the regulus of antimony is the metal from which the earthy or extraneous substances with which it is found have been removed. It is still raw material, so far as any future use of it is concerned. In this sense, it is still crude; yet the statute recognizes its changed condition.

The act of August 30, 1842, c. 270, § 8, item second, levies "on camphor, refined, twenty cents per pound; crude camphor, five cents per pound." (5 Stats., 558.) The only process by which the crude article is refined is by sublimation, vaporizing it by heat.

This same statute admits free "antimony crude, argol," &c. (alphabetically), "Brazil wood, crude brimstone and flour of sulphur, bullion, * * * cream of tartar, * * * saltpetre, when crude, * * * tartar, when crude." (5 Stats., 561.)

Comparing statutes, we see that "tartar, when crude," is the equivalent of "crude tartar." It means when imported with the natural impurities with which it is found mixed.

The act of 1842 also employs another synonym. It fixes the duty "on all gums and other resinous substances, not specified, in a crude state, fifteen per cent. ad valorem; and on the said articles, when not in a crude state," and on pastes, balms, &c., twenty-five per cent. ad valorem. (5 Stats., 559, in the proviso of item "Fourth" of sec. 8.)

Near the commencement of the twenty per cent. Schedule, E (§ 11) of the Act of July 30, 1846, c. 74, is found similar language: "Antimony, crude, and regulus of; arrow-root; articles, not in a crude state, used in dyeing or tanning, not otherwise provided for." (9 Stats., 46, Schedule E.)

In the same schedule are placed "medicinal drugs, roots, and leaves, in a crude state, not otherwise provided for"; and "mineral and bituminous substances, in a crude state, not otherwise provided for." (9 Stats., 47, middle.)

Schedule H of that statute, imposing 5 per centum ad valorem commences thus: "Alcooroque; argol, or crude tartar; bells, when old, or bell-metal, fit only to be remanufactured; berries, nuts, and vegetables, used exclusively in dyeing or in composing dyes; but no article shall be classed as such that has undergone *any* manufacture." (9 Stats., 48, bottom.) Toward the close of that schedule we find "saltpetre, or nitrate of soda, or potash, when crude." (*Id.*, 49, top.)

In the second section of the act of March 3, 1857, c. 98, is found this enumeration: "Medicinal roots, leaves, gums, and resins, in a crude state; * * * antimony, crude or regulus of; * * * camphor, crude; * * * gums, * * * and all other gums and resins in a crude state; articles not in a crude state, used in dyeing or tanning, not otherwise provided for; * * * borax, crude; boucho leaves; brimstone, crude, in bulk"; and many other articles, all of which are subjected to some duty. (11 Stats., 193.)

The free list of that statute includes "argol, or crude tartar; articles in a crude state used in dyeing or tanning, not otherwise provided for; * * * berries, nuts, flowers, plants, and vegetables, used exclusively in dyeing or in composing dye; but no article shall be classed as such that has undergone any manufacture." (*Ibid*, § 3, Schedule I.)

The act of August 5, 1861, c. 45, § 1, makes like discriminations, *ex. gr.:* "On almonds, four cents per pound; shelled almonds, six cents per pound; on brimstone, crude, three dollars per ton; on brimstone in rolls, six dollars per ton; on coffee of all kinds, four cents per pound; on cocoa, three cents per pound; on cocoa leaves and cocoa shells, two cents per pound; on cocoa prepared or manufactured, eight cents per pound; on chicory root, one cent per pound; and on chicory, ground, two cents per pound; * * * on cayenne pepper, six cents per pound; on cayenne pepper, ground, eight cents per pound; on currants, five cents per pound; on argol, three cents per pound; on cream tartar, six cents per pound; on tartaric acid, tartar emetic, and rochelle salts, ten cents per pound; on dates, two cents per pound; on figs, five cents per pound; on ginger-root, three cents per pound; on ginger, ground, five cents per pound [the next section levies 30 per cent. ad valorem "on ginger, preserved or pickled"]; on liquorice, paste and juice, five cents per pound; liquorice root, one cent per pound," &c. (12 Stats., 292.) "On saltpetre, crude, one cent per pound; refined, or *partially* refined, two cents per pound." (*Id.*, 293, top.)

Coming now to the statute under which the duty complained of was assessed (act of July 14, 1862, c. 163), we find its provisions and language similar to those of its predecessors.

It imposes upon "argols, or crude tartar, six cents per pound; cream tartar, ten cents per pound; * * * borax, crude or tincal, five cents per pound; refined, ten cents per pound; * * * camphor, crude, thirty cents per pound; refined, forty cents per pound; * * * cayenne pepper, twelve cents per pound; ground, fifteen cents per pound; black pepper, twelve cents per pound; ground, fifteen cents per pound; white pepper, twelve cents per pound; ground, fifteen cents per pound; * * * ginger, root, five cents per pound; ginger, ground, eight cents per pound; * * * iodine, crude, fifty cents per pound; resublimed, seventy-five cents per pound; * * * licorice, root, one cent per pound; paste or juice, five cents per pound; * * * magnesia, carbonate, six cents per pound; calcined, twelve cents per pound; ochres and ochrey earths, not otherwise provided for, when dry, fifty cents per one hundred pounds; when ground in oil, one dollar and fifty cents per one hundred pounds; oils, essential or essence, * * * amber, crude, ten cents per pound;

rectified, twenty cents per pound; * * * opium, two dollars per pound; opium prepared for smoking, eighty per cent. ad valorem; paraffine, ten cents per pound; Paris white, when dry, sixty cents per one hundred pounds; when ground in oil, one dollar and fifty cents per one hundred pounds; pimento, twelve cents per pound; when ground, fifteen cents per pound; petroleum and coal illuminating oil, crude, ten cents per gallon; refined, &c., twenty cents per gallon; * * * saltpetre, or nitrate of potash, crude, two cents per pound; refined, three cents per pound; * * * whiting, when dry, fifty cents per hundred pounds; when ground in oil, one dollar and fifty cents per hundred pounds," &c. (12 Stats., 547 to 549.)

The next section levies an *additional* duty of ten percentum on "antimony, crude; * * * ginger, preserved or pickled; * * * plaster of Paris, when ground," &c. (*Ib.*) Section 7 adds one cent. per pound to chocolate and cocoa, prepared. Section 8 levies "on chicory, root, two cents per pound; on chicory, ground, burnt, or prepared, three cents per pound; * * * on human hair, raw, uncleaned, and not drawn, twenty per centum ad valorem; when cleaned *or* drawn, but not manufactured, thirty per centum ad valorem; when manufactured, forty per centum ad valorem." (12 Stats., 551.)

The object of these extensive quotations is to show that "crude" means the same as "when crude" or "in a crude state;" just as "ground" and "when ground," "manufactured" and "when manufactured," &c., are used indifferently. Another purpose is to show that, throughout, Congress has discriminated, as to the same article, between the cleansed and the uncleansed, the ground and unground, &c. In this last-cited statute the duty is, "on rice, cleaned, one cent and a half per pound; paddy [unhulled rice], three-quarters of one cent per pound; uncleaned rice [*i. e.*, hulled, but not cleansed], one cent per pound." (12 Stats., 552, middle.) Other instances could easily be added.

We have come down to and have examined the statute the collector sets up as his defense. It requires the payment of six cents a pound upon "argols or crude tartar." (12 Stats., 547.) The act of July 14, 1870, c. 255, § 22, exempts from duty "argols, crude." (16 Stats., 266.) It throughout preserves former distinctions between ground and unground spices, &c., imposing, generally, from fifty to one hundred per cent. more upon the former than on the latter (*Id.*, 263), or upon the prepared rather than the unprepared article or raw material in the rough. (*Ib.;* also, pages 265, 266, 267.) Upon the top of page 266, the first two items are, "Acid, arsenous, crude; acid, nitric, not chemically pure," thus recognizing the difference between the crude article and that which, though not crude, is not yet absolutely and wholly purified. Between these and the line in question here are found "aniline oil, crude," and "ammonia, crude," (*Ib.*) while next to "argols, crude," comes "asbestos, not manufactured." (*Ib.*) Among the things mentioned upon the next page (267) I notice "horse and cow hair, not cleaned and dressed."

The act of 1862 affixed this duty of six cents a pound to all argols; that of 1870 removed it only from *crude* argols.

rectified, twenty cents per pound; * * * opium, two dollars per pound; opium prepared for smoking, eighty per cent. ad valorem; paraffine, ten cents per pound; Paris white, when dry, sixty cents per one hundred pounds; when ground in oil, one dollar and fifty cents per one hundred pounds; pimento, twelve cents per pound; when ground, fifteen cents per pound; petroleum and coal illuminating oil, crude, ten cents per gallon; refined, &c., twenty cents per gallon; * * * saltpetre, or nitrate of potash, crude, two cents per pound; refined, three cents per pound; * * * whiting, when dry, fifty cents per hundred pounds; when ground in oil, one dollar and fifty cents per hundred pounds," &c. (12 Stats., 547 to 549.)

The next section levies an *additional* duty of ten percentum on "antimony, crude; * * * ginger, preserved or pickled; * * * plaster of Paris, when ground," &c. (*Ib.*) Section 7 adds one cent. per pound to chocolate and cocoa, prepared. Section 8 levies "on chicory, root, two cents per pound; on chicory, ground, burnt, or prepared, three cents per pound; * * * on human hair, raw, uncleaned, and not drawn, twenty per centum ad valorem; when cleaned *or* drawn, but not manufactured, thirty per centum ad valorem; when manufactured, forty per centum ad valorem." (12 Stats., 551.)

The object of these extensive quotations is to show that "crude" means the same as "when crude" or "in a crude state;" just as "ground" and "when ground," "manufactured" and "when manufactured," &c., are used indifferently. Another purpose is to show that, throughout, Congress has discriminated, as to the same article, between the cleansed and the uncleansed, the ground and unground, &c. In this last-cited statute the duty is, "on rice, cleaned, one cent and a half per pound; paddy [unhulled rice], three-quarters of one cent per pound; uncleaned rice [*i. e.*, hulled, but not cleansed], one cent per pound." (12 Stats., 552, middle.) Other instances could easily be added.

We have come down to and have examined the statute the collector sets up as his defense. It requires the payment of six cents a pound upon "argols or crude tartar." (12 Stats., 547.) The act of July 14, 1870, c. 255, § 22, exempts from duty "argols, crude." (16 Stats., 266.) It throughout preserves former distinctions between ground and unground spices, &c., imposing, generally, from fifty to one hundred per cent. more upon the former than on the latter (*Id.*, 263), or upon the prepared rather than the unprepared article or raw material in the rough. (*Ib.;* also, pages 265, 266, 267.) Upon the top of page 266, the first two items are, "Acid, arsenous, crude; acid, nitric, not chemically pure," thus recognizing the difference between the crude article and that which, though not crude, is not yet absolutely and wholly purified. Between these and the line in question here are found "aniline oil, crude," and "ammonia, crude," (*Ib.*) while next to "argols, crude," comes "asbestos, not manufactured." (*Ib.*) Among the things mentioned upon the next page (267) I notice "horse and cow hair, not cleaned and dressed."

The act of 1862 affixed this duty of six cents a pound to all argols; that of 1870 removed it only from *crude* argols.

When Recknagel & Co. presented their importation of argols for inspection, the collector was necessarily and immediately confronted with the question whether they were or were not *crude*, *i. e.*, in their crude state. The importers argued that so long as they were argols they must also be crude argols; that there is no such thing in commerce as an argol not crude; that when the crudities were removed the article ceased to be argol and became tartar or cream of tartar.

The collector's answer seems to have been that the statute did create or recognize a distinction between argols and crude argols, and the former must mean those argols not imported in their natural condition; those from which some impurities had been removed, although not yet refined into pure tartar; that it might be crude as tartar though not crude as argols.

Whether or not this particular lot had been subjected to any cleansing or purifying process was a question of fact which he answered affirmatively; and the jury have affirmed the correctness of that answer. They could not do otherwise upon the evidence of the plaintiffs' first and main witness, Professor Doremus, who testified that the argols in question had been subjected to boiling, whereby foreign matter and lime had been removed, and the article rendered capable of use, just as imported, in the arts. (Record, 20 to 25.) One of the plaintiffs testified that they sold the article for such uses, baking, dyeing, &c. (Record, 25, 26.) They also admitted the difference between the crude deposit upon the wine cask and the plaintiffs' article, which facts were further shown by the defendant's witnesses and samples. (Record, 26 to 31.) Indeed, the defendant's expert testified that the importation was not crude tartar, but was partially refined cream of tartar, and it was admitted by the plaintiffs that they sold it for the same uses.

The language of the Revised Statutes is evidence of what was supposed to be the pre-existing law. Upon page 473 of the second edition, A. D. 1878, being Schedule M of section 2504, we find "argols (other than crude), six cents per pound." The free list, section 2505, near the top of page 483, contains "argols, crude."

The revision is entitled "An act to revise and consolidate the statutes of the United States *in force* on the 1st day of December, A. D. 1873." It was not intended to embrace new legislation. It recognizes as already existing a difference between argols crude and those which have been subjected to a process of or toward purification.

The reason for this legislative discrimination is indicated in the statement of Professor Doremus that, in recent years, it has been undertaken to utilize argols produced in this country, which formerly were not saved. (Record, 14, middle.) It was to protect our own incipient manufacture.

The uses of the article are so manifold, and the consumption so enormous and of such a character, as to make home production very desirable, and the duty leviable upon foreign importations a considerable item in our revenues.

One of those uses is as a dye, to which use the article as imported by the plaintiffs was adapted. (Record, 23; folio 58, top.) Such commodities have always been subject to discrimination as to their state. For instance, under the act of March 3, 1857, "articles in a crude state used in dyeing or tanning" came in free; those "not in crude state" paid five per cent. duty. (11 Stats., 193.) This and similar provisions have been noticed in the earlier part of this brief.

II.

The letter of Judge Richardson of October 1, 1872, as acting Secretary of the Treasury (Record, p. 13), was properly excluded. It was not a decision of any appeal of these plaintiffs. It assumed to determine nothing as to them. It related entirely to the appeal of one R. D. Jackson, as to the facts of whose case we have, and need to have, no knowledge. It was, emphatically, *res inter alios acta.* The subsequent action of the Treasury Department in having this cause tried at the circuit, and its presentation here, sufficiently show that the position of that letter was abandoned. Probably the sole purpose of offering it was a hope that its reading might influence the judge upon the circuit or have effect here, though how this could be anticipated we cannot see, since the mere perusal of it indicates the fallacy of its positions.

The act of August 5, 1861, c. 45, § 1, put a duty "on argol, three cents a pound; on cream of tartar, six cents a pound." (12 Stats., 292.) The act of July 14, 1862, c. 163, § 5, imposed, "in lieu of the duty heretofore imposed by law" * * * upon "argols or crude tartar, six cents per pound; cream tartar, ten cents per pound." (*Id.*, 546–7.) Why this did not entirely repeal the pre-existing provision upon this subject, I think it would puzzle the clerk who prepared that letter to explain. Then comes the act of August 14, 1870, c. 255, § 22 (16 Stats., 266), putting upon the free list "argols, crude." How this could possibly have the effect to repeal the act of 1862 as to *all* argols, and yet revive the act of 1861, containing the same general word ("argol"), so as to subject the partially refined to three cents, is more puzzling still.

The statute of 1862 certainly included *all* argols. If that of 1870 (as to argols, crude) did not also include all argols, those not included must assuredly remain dutiable under the pre-existing law of 1862, at six cents a pound. No conceivable reason can be stated or imagined by me for relieving them of that duty and remanding them to the three cent provision of the act of 1861. The truth is, that letter was hastily and perfunctorily written by some clerk, and signed (as must necessarily almost always be the case as to such matters) by the then acting Secretary, without any personal examination or knowledge of the subject to which it related. The government lost very severely by the adoption of this curious construction and the modification of the former correct ruling.

As I understand the reasoning upon which this letter proceeds, if it were based on reason at all, and not written in mere thoughtlessness, it assumed that "argol," in the act of August 5, 1861, included argols in every stage short of cream of tartar; that "argols, or crude tartar," in the act of July 14, 1862, included only *crude* argols; that adjective qualifying the word,—though separated from it by a comma and a disjunctive,—as well as the following word tartar; so that, upon this theory, after this second act took effect, *crude* argols should have been (and were) assessed at six cents; the partially refined argols should have been (but were *not*) assessed at three cents, and cream of tartar (as it was) at ten cents! That is, the crude should have been assessed double the partially refined! while the refined paid nearly double the crude, and nearly treble the partially refined! Therefore, the partially refined, never having properly been included in the act of 1862 at all, did not come into the free list of 1870. Reasoning which led to such practical results should have been carefully scrutinized before being accepted as the basis of a large refund from the Treasury. That department, from the day the act of July 14, 1862, took effect up to the date of this letter, never dreamed of exacting only three cents upon any argols whatever. The before-quoted language of the revision shows that nobody could carefully examine the statutes and hold the ground taken in this letter to be tenable.

III.

The objection to the question asked upon cross-examination of Mr. Pagenstacher, one of the plaintiffs, to wit, "Are *these* argols used for the same purposes as cream of tartar?" (Record, 25, bottom) cannot be sustained.

It was material, as showing that the articles imported had ceased to be crude, and were so far purified as to be adapted to the uses of cream of tartar, which is dutiable at ten cents per pound.

IV.

The evidence as to the character of the argols invoiced prior to October, 1871 (Record, 26; folio 66) was properly excluded.

The four importations, as to which testimony was taken, are those last named in the "schedule," occupying pages 4 and 5 of the record; all invoiced in October and entered in November, 1871, and duties paid a few days thereafter, probably upon liquidation, and appeal made to the Secretary of the Treasury within the next thirty days. As to these four, and as to them *only*, the plaintiffs proved that no answer had been returned when the suit was brought. As to the earlier appeals, they offered the letter of October 1, 1872, criticised in the second division of this brief as a decision of those appeals; but it was excluded for the obvious reason that it did not relate to them at all, nor purport to decide them, and the plaintiffs did *not* then prove that no answer had been made to their earlier appeals,—probably because such was not the fact; therefore, they failed to show the suit seasonably brought under R. S., § 2931, as to those appeals, and the court properly excluded all testimony as to the character of such importations. (Record, 26; folio, 67.)

V.

In addition to the testimony of particular witnesses upon both sides, whose names are given, and to which I have already adverted, the record states: "A large number of witnesses were then called by the defendant from the trade, and from among manufacturers of cream of tartar and dealers and others, whose testimony tended to prove that there was an article of commerce and of importation which was unlike the plaintiffs' samples, which was, in fact, 'crude argols'; that the plaintiffs' samples exhibited at the trial were *not* 'crude argols'; that said samples differed from crude argols in this, that they had been subjected to two or more processes of washing or refinement, by which the yield of bitartrate of potash in them was made at a large percentage, to wit, from 90 to 88 per cent., which rendered the argols of the same value for the manufacture of baking powders as cream of tartar, from which article in a crystallized form it did not differ, although there were various kinds of cream of tartar distinguishable in value and appearance by purity of color. This testimony further tended to show that some argols are of more value and yielded a higher percentage of bitartrate of potash than cream of tartar, and that this was the case with some of the plaintiffs' samples. One of the witnesses further testified that the samples shown Professor Doremus, pulverized, and stated by him to seem stronger of tartaric acid than the pulverized sample of cream of tartar which Professor Doremus produced, was in fact a pulverization of a small part of the plaintiffs' samples which the witness had pulverized since their first production at the trial. *These witnesses also testified* UNIFORMLY *that the plaintiffs' samples were refined argols*, and that *there was a difference between them and crude argols.* Samples of crude argols were exhibited, which samples differed as above stated from those exhibited by the plaintiffs. Also, that there was a difference between 'crude argols' and the lees of wine, and THAT ALL THESE DIFFERENCES WERE WELL UNDERSTOOD BY THE TRADE and by manufacturers." (Record, 33, 34; folios 87, 88.)

In the face of this testimony, the plaintiffs' counsel asked the judge to direct a verdict for the plaintiffs, and excepted to his refusal to do so! (Record, 34; folio 88.) Therefore, we need not be surprised at any position taken by them in the argument of this cause. What course that argument will pursue is unknown, as this brief is prepared before theirs is filed; but it does not seem, judging from this last-mentioned exception, that it will be at all controlled by the state of the evidence.

With all this testimony before him, showing an article, differing from the plaintiffs', known specifically as crude argols, was not the judge right in charging the jury, as matter of law, that Congress, in 1870, made a distinction between argols generally and argols crude; and that if they found "the importations in question were not argols crude, then the plaintiffs are not entitled to a verdict"? (Record, 34; folio 89.)

The jury found, as they could hardly fail to do, that these were not crude argols, although the learned judge erroneously instructed them that the burden of proving this fact was upon the collector. (Arthur *v.* Unkart, 96 U. S., 118.)

It seems that the plaintiffs have had refunded to them $17,000, as one-half of the six cents a pound originally collected, the refund being upon the basis of the rate of three cents a pound, under the act of August 5, 1861, as mentioned in the letter of October 1, 1872, to which reference has already been made. That payment was pleaded as an accord and satisfaction in the court below and relied upon as such at the trial. (Record, 8, 9; folios 35, 36.) I am so fully convinced that six cents was the proper rate, and that the $17,000 was improperly refunded, that I shall not attempt any discussion of this question of accord here.

While others in the same business have imported cream of tartar, paying ten cents a pound, these plaintiffs have originally paid but six cents upon argols refined to an extent that induced their sale and use for precisely the same purposes, and then have had one-half their payments restored to them, upon an erroneous, retroactive, interpretation of the law; and with these advantages they are not content! Doubtless, many other thousands were improperly refunded under the same singular construction.

VI.

The plaintiffs excepted to the judge's statement that Congress, in 1870, seems to have made a distinction between argols generally and argols crude. (Record, 36; folio 94.)

This embraces the whole question as to whether or not this act of July 14, 1870, § 22, does put upon the free list only argols crude, leaving those other than crude to pay the six cents imposed by the act of July 14, 1862, § 5, as the Revised Statutes now unquestionally does. It has been sufficiently argued. I think the purpose to do so very apparent from a comparison of statutes and an examination of the facts relating to this article of commerce and the then recent attempts to introduce the manufacture of cream of tartar from it into this country, &c.

VII.

1. Of the plaintiffs' six requests for instructions (Record, 36, lower half), the first, though wrong, was substantially given; and an untenable exception is given because the judge adhered to his own phraseology in preference to that selected for him by the plaintiffs.

2. The same may be said of the second. It was distinctly left to the jury, if the argols were crude, to find for the plaintiffs; if not crude, for the defendant. The instruction asked for assumes that if not fully refined they must be crude. This is not so. They may be so

far purified as to be no longer crude, and to lose that name in the trade, without being so thoroughly freed from extraneous matter as to be known as refined argols or refined tartar, or as cream of tartar. Thus, in the act of August 5, 1861, we find the duty to be "on saltpetre, crude, one cent per pound; refined, or partially refined, two cents per pound." (12 Stats., 293, top.) In the next tariff, approved July 14, 1862, the duty is upon "saltpetre, or nitrate of potash, crude, two cents per pound; refined, three cents per pound." (*Id.*, 548, bottom.)

This language indicates that the legislators considered that an article partially refined could no longer be deemed crude; hence they dropped the qualifying adverb in the second statute.

3. The third requested instruction had been substantially given, though the plaintiffs were not entitled to it. The judge had instructed the jury to determine "whether these argols were argols crude—those known to commerce as such." (Record, 35; folio 91.) The real inquiry was whether or not they were in their natural, crude state, and this the plaintiffs did not claim.

4. The fourth covered the same ground in more comprehensive and less admissible language.

5. So of the fifth, neither being supported by the testimony.

6. "That crude argols—no matter as to the degree of crudeness—were entitled to free entry" (Record, 36, bottom) has been sufficiently considered in connection with the second request, and in the preceding part of this brief.

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